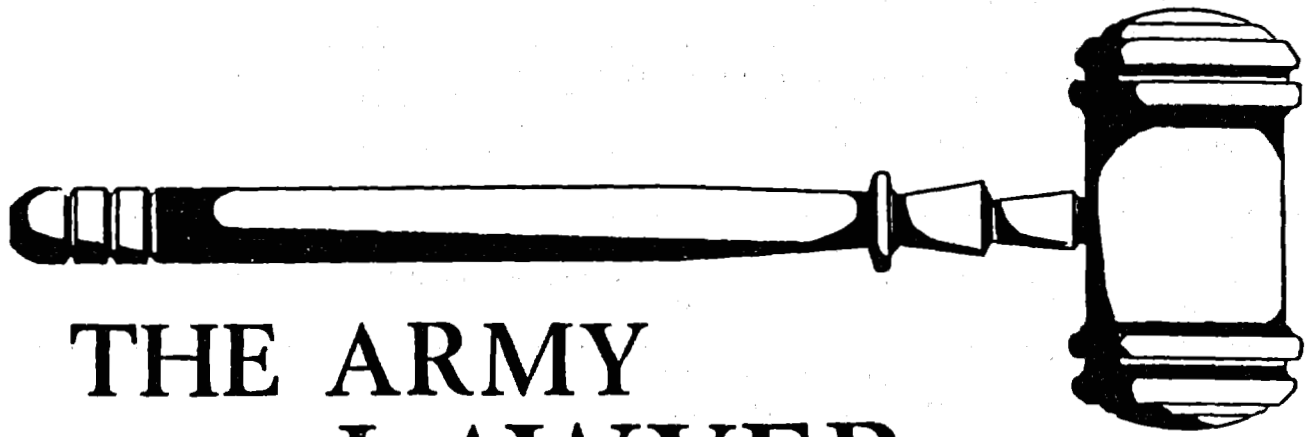

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Articles

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Captain Benjamin T. Kash

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1991 Contract Law Developments—the Year in Review

Major Anthony M. Helm; Lieutenant Colonel John T. Jones, Jr.;
Major Harry L. Dorsey; Major Michael A. Killham;
Major Bobby D. Melvin, Jr.; Major Michael K. Cameron

Foreword

Although reviewing the developments of the past year was not an especially difficult process, our challenge was to distill, from all that occurred in this vast field, the salient information that practitioners may need to navigate confidently through the coming year. We sifted through the Defense Authorization and Appropriations Acts and have provided you with a view of the general direction defense acquisition will take in 1992. Likewise, from the many regulatory changes issued by federal departments and activities, we gleaned what appear to be the most significant or interesting developments in this area. Of course, we also have presented that which adds life to what we do for a living—important and unusual items of decisional law. In sum, we hope that all of our readers will find this article instructive and that, in some way, it will make their jobs just a bit easier.

Legislation

The National Defense Authorization Act

Introduction

On December 5, 1991, President Bush signed the National Defense Authorization Act for Fiscal Years 1992 and 1993.[1] Many contract law practitioners had believed that 1991 would be a relatively inactive year for Congress, but the lawmakers ultimately proved us wrong. The most significant legal changes appeared in the research and development area.[2] This note discusses these changes and other key provisions in the new act that likely will affect the acquisition process.

Presidential Inauguration Assistance

Congress authorized the Secretary of Defense to provide the Presidential Inaugural Committee with materials, supplies, and the services of military personnel and civilian employees during fiscal year (FY) 1992 and FY 1993.[3] The Secretary's discretion under this law is much broader than the authority he normally enjoys under 10 U.S.C. § 2543.[4]

Stock Fund Limitation

Congress limited the Defense Department's authority to incur obligations against stock funds in FY 1992 to eighty percent of total stock funds sales in FY 1992.[5] By thus restricting the DOD's ability to incur obligations, Congress apparently intended to reduce the inventory levels for stock funded activities in FY 1992. Notably, Congress specifically excluded fuel, commissary and subsistence items, retail operations, equipment repairs, and the cost of operations from this limitation. It also empowered the Secretary of Defense to waive the limitation if he determines that a waiver is critical to national security.

Congress further provided that the DOD may not obligate stock funds to acquire supply items if the purchase of these items probably would create an on-hand inventory that would exceed a two-year operating stock.[6] This provision does not apply to war reserves. Moreover, the head of the contracting activity (HCA) may waive this restriction if the HCA determines that: (1) the acquisition is necessary to achieve an economical order quantity; (2) the acquisition will not result in an on-hand inventory that would exceed three years' demand; and, (3) the demand for the item is not likely to decline during the period for which the acquisition is to be made. The HCA also may waive the inventory limit if an acquisition is necessary to maintain an industrial base or to promote national security.

Naval Shipyards and Aviation Depots

Congress once again authorized naval shipyards and Army, Navy, and Air Force aviation depots to compete for contracts for the production of defense-related articles

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[1]Pub. L. No. 102-190, 105 Stat. 1290 (1991).

[2]Curiously, Congress did not include any of the long-awaited amendments to the postemployment restriction statutes in this year's Authorization Act.

[3]National Defense Authorization Act for Fiscal Years 1992 and 1993 § 307, 105 Stat. at ___. The Inaugural Committee is established under the authority of 36 U.S.C. § 721 (1988).

[4]This permanent statute authorizes the Defense Department to lend hospital tents and furniture, litters, ambulances with drivers, camp appliances, and flags to the Inaugural Committee. *See* 10 U.S.C. § 2543(a) (1988).

[5]National Defense Authorization Act for Fiscal Years 1992 and 1993 § 311, 105 Stat. at ___

[6]*Id.* § 317, 105 Stat. at ___ (amending 10 U.S.C. § 2213 (1988)).

and to contract for services related to defense programs.[7] This is a one-year authorization.

Congress Authorizes Agencies to Compete for Depot Maintenance

Congress amended a statute that had prohibited Army and Air Force activities from initiating competitions between Army or Air Force maintenance activities, or between military maintenance facilities and private contractors, to select contractors to perform depot maintenance workloads.[8] The law now requires the Defense Department to expend at least sixty percent of its available, depot-level maintenance funds on work performed by DOD employees. The Secretary of Defense, however, may waive this requirement if waiver is critical to national security.

This new section also directs the Secretary of Defense to conduct a pilot program for competitively selecting entities, including DOD depot-level activities, to perform materiel maintenance duties for the Army and Air Force. Defense Department activities now may compete for up to ten percent of all depot-level maintenance jobs that the DOD has not reserved specifically to DOD employees in accordance with congressional mandate.[9]

Congress Extends Commander Authority Over Commercial Activity Program

Congress extended through September 30, 1993, the authority of installation commanders to manage commercial activities programs on their installations.[10] In the past, the Department of the Army and the Department of the Navy have labored to dispel a persistent misconception that this provision permits installation commanders to "shelve" these programs. Both departments have stressed that this is not the case and occasionally have chided their major commands for failing to comport with departmental commercial activities policies.[11]

Congress Makes DOD Contractors Responsible for Hazardous Waste Damages

All contracts for the removal of hazardous waste that Defense Department activities award after February 2, 1992, must require contractors to reimburse the government for certain damages. A contractor or subcontractor must reimburse the government for all liabilities, costs, penalties, and damages that the government may suffer as a result of the contractor's or subcontractor's breach, negligence, or willful act or omission during the performance of the contract.[12] Within thirty days of the contract award, each contractor and subcontractor must demonstrate its ability to indemnify the government.

This law does not apply to remedial action contracts under the Defense Environmental Restoration Program, nor does it apply when the generation of hazardous waste is merely incidental to the performance of a contract. Moreover, the Secretary of Defense or any service secretary may waive the reimbursement requirement upon finding that: (1) for a particular contract, only one responsible contractor has extended an offer, or that no responsible offeror is willing to agree to this provision; or (2) the failure to award a waste removal contract would place a facility in violation of the law.

Expenditure Limits for Environmental Restoration Funds

Congress generally prohibited the Defense Department from using FY 1992 Defense environmental restoration funds to pay environmental fines or penalties. The DOD may draw on these funds to pay a fine or penalty only if the fine or penalty arises from an act or omission relating to the DOD's environmental restoration program.[13]

Surety Bond Legislation

Congress reaffirmed its prohibition on using appropriated funds to obtain surety bonds to guarantee an agency's performance of any direct function.[14] Accordingly, DOD agencies may not obtain bonds to comply with the normal requirements of state or local environmental laws or regulations.

Under another section of the Act,[15] Congress limited the liability of the surety on an environmental restoration contract to the lesser of either the penal sum of the bond or the cost of completing the contract. It also absolved sureties from liability for personal injury or property

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[7] *Id.* § 1011, 105 Stat. at ___ (amending 1991 Defense Authorization Act, Pub. L. No. 101-510, § 1425, 104 Stat. 1485, 1684 (1990)). This authority does not extend to ship construction, overhaul, repair, or maintenance; ship refueling; aircraft maintenance and repair; or aircraft engine manufacture, overhaul, or repair.

[8] *Id.* § 314, 105 Stat. at ___ (amending 10 U.S.C. § 2466 (1988)).

[9] Section 314 also repealed section 922 of the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, 104 Stat. 1485, 1627 (1990), which had authorized the Secretary of Defense to conduct limited pilot programs involving depot-level maintenance workload competitions.

[10] National Defense Authorization Act for Fiscal Years 1992 and 1993 § 315, 105 Stat. at ___ (amending 10 U.S.C. § 2468 (1988) (commonly referred to as the "Nichols Amendment")). Significantly, Congress declined to adopt a House proposal that would have made this authority permanent.

[11] *See* Memorandum, HQ, Dep't of Army, 29 Aug. 1991, subject: Commercial Activities (CA) Program; Memorandum, HQ, Dep't of Navy, 28 Mar. 1991, subject: Commercial Activities Program.

[12] National Defense Authorization Act for Fiscal Years 1992 and 1993 § 331, 105 Stat. at ___ (to be codified at 10 U.S.C. § 2708).

[13] *Id.* § 333, 105 Stat. at ___.

[14] *Id.* § 335, 105 Stat. at ___.

[15] *Id.* § 336, 105 Stat. at ___. This section governs the surety bonds that contractors must furnish before the United States may award them contracts to perform environmental restoration projects. *See generally* Miller Act § 1, 40 U.S.C. § 270a (1988). It applies only to bonds issued between October 1, 1991, and December 31, 1992.

damage. Finally, Congress confirmed that only the government may sue on performance bonds issued for environmental restoration projects.[16]

Contracts for Equipment Maintenance and Operation

Congress added operation and maintenance of equipment to its list of exceptions to the "bona fide needs" rule.[17] As amended, 10 U.S.C. § 2410a permits DOD activities to draw on Department of Defense annual funds for up to twelve months, beginning at any time during the fiscal year, to pay contractors under operation and maintenance contracts.

Proceeds from Sale of Unclaimed Property to Support Morale, Welfare, and Recreation Activities

Almost invariably, Defense Department activities must deposit into the United States Treasury all proceeds that they realize from sales of unclaimed property.[18] This year, however, Congress relaxed this rule slightly when it selected two installations to participate in a test program. A participant in this program may sell lost, abandoned, or unclaimed property that comes into its custody or control. It then may use sale proceeds to reimburse its operations and maintenance accounts for costs it incurs in selling the property. After reimbursing these accounts, the installation may use any remaining proceeds to support its morale, welfare, and recreation activities.[19]

Incidental Expenses of Volunteers

Congress authorized the Department of Defense to use appropriated funds to reimburse certain volunteer workers for their incidental expenses. Ombudsmen for museums or natural resources programs and volunteers that assist in military family service center programs all may claim reimbursement under this statute. The authorization extends not only to programs operated by the military services, but also to Coast Guard programs.[20]

Small Purchase Procedures in Support of Contingency Operations

In response to a Defense Department request, Congress raised the dollar threshold for the use of simplified acquisition procedures from $25,000 to $100,000 for any purchase made, or contract awarded and performed, outside the United States to support a military contingency operation.[21] Congress defined "contingency operation" as any military mission that the Secretary of Defense designates as an operation in which members of the armed forces are, or shall become, involved in military action, operations, or hostilities against an opposing force or an enemy of the United States. This definition also includes any military operation that results in the activation or retention on active duty of members of the uniformed services.[22]

Congress Active in Independent Research and Development and Bid and Proposal Costs Arenas

Congress substantially modified the rules governing independent research and development (IR&D) and bid and proposal (B&P) costs.[23] Current regulations require DOD activities to obtain advance agreements from contractors on IR&D and B&P ceilings. In the 1992 Act, lawmakers essentially directed the Department of Defense to issue new regulations that will eliminate this requirement. To allay DOD concerns that the elimination of cost ceilings may trigger increased short-term expenditures, Congress expressly limited the amount of IR&D and B&P costs allowable between FY 1993 and FY 1995. In FY 1993, for instance, a contractor that has allocated a total of $10 million in IR&D and B&P costs to its DOD contracts may recover no more than 105% of its allowable costs for the preceding year. The Secretary of Defense may waive this near-term cost ceiling when waiver is in the interest of the government. By FY 1996, these costs will be fully reimbursable as indirect expenses insofar as they are allocable, reasonable, and allowable.

Congress no longer requires DOD activities to obtain technical reviews of proposed IR&D and B&P projects. Instead, new DOD regulations must prescribe simplified, effective, formal mechanisms that will facilitate the exchange of fiscal and technical information between the Department of Defense and the defense industry.[24]

Dual-Use Critical Technology

Congress directed the Secretary of Defense to establish a program to foster partnerships between the Department

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[16] *See* 10 U.S.C. § 2701 (1988).

[17] National Defense Authorization Act for Fiscal Years 1992 and 1993 § 342, 105 Stat. at ___ (amending 10 U.S.C. § 2410a (1988), which also exempts maintenance of tools and facilities, depot maintenance, and leases of real property). *See generally* 31 U.S.C. § 1502 (1988) (setting forth the "bona fide needs" rule).

[18] *See* 10 U.S.C. § 2575(b) (1988).

[19] National Defense Authorization Act for Fiscal Years 1992 and 1993 § 343, 105 Stat. at ___. The two test installations are the naval base and the naval air station at Norfolk, Virginia.

[20] *Id.* § 345, 105 Stat. at ___ (amending 10 U.S.C. § 1588(c) (1988), which, before its amendment, had permitted Department of Defense activities to use only nonappropriated funds to reimburse qualified volunteers for incidental expenses).

[21] *Id.* § 805, 105 Stat. at ___.

[22] *Id.* § 631, 105 Stat. at ___ (amending 10 U.S.C. § 101 (1988); 37 U.S.C. § 101 (1988)).

[23] *Id.* § 802, 105 Stat. at ___.

[24] H.R. Conf. Rep. No. 311, 102d Cong., 1st Sess. 569 (1991).

of Defense and non-DOD entities—including private industries—that will promote the research, development, and application of dual-use critical technologies.[25] The Defense Department may use grants, contracts, or other cooperative agreements to facilitate this program.

Subcontract Cost or Pricing Data Thresholds

The 1991 Defense Authorization Act raised to $500,000 the cost and pricing data threshold for all contracts into which DOD activities entered *after* December 5, 1990. The 1991 Act, however, did not increase the threshold for subcontracts under prime contracts that the Department of Defense awarded *before* December 5, 1990. For FY 1992, Congress raised the threshold for these subcontracts to $500,000, effective December 5, 1991. The new law applies to all subcontracts or subcontract modifications that relate to, or derive from, prime contracts awarded on or before December 5, 1990.[26] A prime contractor may request a modification of its contract to reflect the new requirement.

Payment Protection for DOD Subcontractors

Congress instructed the Department of Defense to issue regulations to govern subcontractor requests for information about the payment and bonding of prime contractors.[27] Specifically, the Defense Department must implement procedures to advise subcontractors about prime contractor progress, interim, or final payments. It also must require contracting officers and prime contractors to provide payment bond information to actual or prospective subcontractors. This section of the Act also requires contracting officers to investigate credible assertions that prime contractors are not paying their subcontractors properly. If a contractor's nonpayment is substantial, the contracting officer must take appropriate remedial action.

Rescission of Buy American Act Waivers

Congress ordered the Secretary of Defense to rescind Buy American Act[28] waivers for particular products if the Secretary determines that a country with which the United States has entered into a reciprocal acquisition agreement has discriminated against similar American products.[29] The Secretary, however, must consult with the United States Trade Representative before rescinding any waiver.

Valve, Machine Tool, and Carbonyl Iron Powder Restrictions

Congress extended the Buy American Act restriction on valves and machine tools through 1996.[30] Under this restriction, the Department of Defense normally may acquire certain valves and machine tools only if they are manufactured in the United States or Canada. Congress also provided that the prohibition on the use of nondomestic carbonyl iron powder in DOD items will end in January 1993, rather than September 1994.[31]

Whistleblower Protection

The Act directs the Department of Defense to issue regulations proscribing reprisals against members of the armed forces that make lawful communications to officials in audit, inspection, or law enforcement organizations.[32] Any service member that violates these regulations will be subject to trial by court-martial under the Uniform Code of Military Justice. Congress also directed the DOD Inspector General to review annually the efforts of military departments to address reprisal claims.

CINC Initiative Fund

Congress authorized the Department of Defense to draw on the Commander in Chief's (CINC) Initiative Fund to meet the costs of force training, contingencies, selected operations, command and control, joint training, humanitarian and civil assistance, military education, training foreign personnel, and other, specifically enumerated activities.[33] This statute also imposes expenditure ceilings for particular activities.

Members of the House of Representatives remarked in a conference report[34] that the DOD need not seek specific authorization for CINC Initiative funding of counternarcotic efforts because existing categories, such as force

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[25] National Defense Authorization Act for Fiscal Years 1992 and 1993 § 821, 105 Stat. at ___.

[26] *Id.* § 804, 105 Stat. at ___.

[27] *Id.* § 806, 105 Stat. at ___.

[28] 41 U.S.C §§ 10a to 10c (1988).

[29] *Id.* § 833, 105 Stat. at ___.

[30] *Id.* § 834, 105 Stat. at ___ (amending 10 U.S.C. § 2507 (1988)).

[31] *Id.* § 835, 105 Stat. at ___ (amending 10 U.S.C. 2507(e) (1988)).

[32] *Id.* § 843, 105 Stat. at ___.

[33] *Id.* § 902, 105 Stat. at ___ (to be codified at 10 U.S.C. § 166a).

[34] H.R. Conf. Rep. No. 311, 102d Cong., 1st Sess. 586 (1991).

training or contingencies, already cover these activities. In the report, the conferees also instructed the Department of Defense to refrain from using joint exercise funds to acquire equipment or other items for eventual transfer to a foreign armed force that participates in an exercise.

Congress Repeals Acquisition Workforce Reductions Statute

Last year, Congress directed the Department of Defense to reduce its acquisition workforce by twenty percent over a five-year period.[35] This year's authorization act repealed that law.[36] Although Congress still believes that personnel reductions are necessary, it has determined that the Defense Department can meet its reduction goals without statutory mandate.

"Black" Programs

The Department of Defense Authorization and Appropriations Acts incorporate by reference the classified annexes that appear in their respective conference reports.[37] The conference reports state that classified annexes "have the force and effect of law as if enacted into law."[38] Funds that Congress has authorized and appropriated for a specific activity that is listed in a classified annex are subject to the terms and conditions set forth in that annex. Attorneys should become familiar with the annexes that govern their programs or activities. They also should be aware, however, that any amount specified in a classified annex *does not* increase an amount authorized or appropriated in other sections of the act to which the annex pertains.

Military Construction Authorization Act for Fiscal Year 1992

O&M Fund Threshold Increases

In this year's Military Construction Authorization Act, Congress increased the funding threshold for unspecified minor construction projects to $1.5 million. Additionally, DOD activities now may obligate up to $300,000 from their operation and maintenance funds for individual minor construction projects.[39] The $300,000 limit for O&M funded projects also applies to Reserve components.[40]

Long-Term Facilities Contracts

The authority of DOD activities to enter into contracts for the construction, management, and operation of various types of facilities on or near a military installation is now permanent.[41] Congress also removed the legal impediment to third-party financed acquisitions that it had imposed in an earlier test program. Contract law practitioners should note, however, that the Office of Management and Budget considers an arrangement of this sort to be a capital lease, which will require full funding in its first year.

Congress Enacts Permanent Build-to-Lease and Rental Guarantee Authority

Congress codified the Defense Department's authority to acquire family housing by long-term lease when leasing is more cost effective than construction.[42] Congress also permanently extended the housing rental guarantee program and lifted the restriction on the number of rental guarantees that the Department of Defense may execute during a fiscal year.[43]

The 1992 Department of Defense Appropriations Act

Introduction

On November 26, 1991, President Bush signed the Department of Defense Appropriations Act for 1992.[44] The Act provides budget authority for all Department of Defense (DOD) programs except military construction and family housing. Congress granted budget authority for the latter programs in the 1992 Military Construction Appropriations Act.[45]

Pork Barrel Research

Congress normally requires the Defense Department to award research and development grants and contracts to

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[35] National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 905, 104 Stat. 1485, 1621 (1990).

[36] National Defense Authorization Act for Fiscal Years 1992 and 1993 § 904, 105 Stat. at ___

[37] *Id.* § 1005, 105 Stat. at ___; *see also* Department of Defense Appropriations Act, 1992, Pub. L. No. 102-172, § 8125, 105 Stat. 1150, ___ (1991).

[38] H.R. Conf. Rep. No. 311, 102d Cong., 1st Sess. 595 (1991); H.R. Conf. Rep. No. 328, 101st Cong., 2d Sess. 32 (1991).

[39] National Defense Authorization Act for Fiscal Years 1992 and 1993 § 2807, 105 Stat. at ___ (amending 10 U.S.C. § 2805 (1988)).

[40] *Id.* § 2804, 105 Stat. at ___ (amending 10 U.S.C. § 2233a(b) (1988)).

[41] *Id.* § 2805, 105 Stat. at ___ (amending 10 U.S.C. § 2809 (1988), which previously had authorized only a test program).

[42] *Id.* § 2806, 105 Stat. at ___ (to be codified at 10 U.S.C. § 2835) (also amending 10 U.S.C. § 2828 (1988)).

[43] *Id.* § 2809, 105 Stat. at ___ (amending 10 U.S.C. § 2821 (1988) and adding 10 U.S.C. § 2836).

[44] Pub. L. No. 102-172, 105 Stat. 1150 (1991).

[45] Pub. L. No. 102-136, 105 Stat. 637 (1991).

colleges and universities on a competitive basis.[46] Last year, however, Congress directed the DOD to award "sole-source" grants to nineteen academic institutions during FY 1992.[47] Among these mandatory endowments is a $2 million grant to Walter Reed Army Institute of Research to establish a center for prostate disease research. Congress demonstrated unusual leniency in establishing terms and conditions for many of these grants—in most cases stating expansively that grantees may use the funds for "laboratory and other efforts associated with research, development and other programs of major importance to the Department of Defense."[48]

The Defense Department may not draw on appropriated funds to award any contract or grant to an institution of higher learning unless it first audits the proposed grant or contract. The institution, moreover, must "respond[] fully" to the DOD's requests for financial information. If an institution fails to provide the DOD with an adequate financial response within twelve months of award, the Secretary of Defense must terminate all contracts or grants with the institution.[49] Congress has provided the DOD with $2.5 million to hire an additional fifty auditors that will be assigned to audit university contracts.[50]

Destruction of Chemical Agents and Munitions

Congress forbade the Defense Department to use appropriated funds to acquire equipment for chemical weapons disposal facilities at Anniston and Umatilla Army Depots until the Secretary of the Army certifies that the Army has begun phase III of operation verification testing at Johnston Atoll Chemical Agent Destruction Facility.[51]

Obligation Rates

In a continuing effort to force the Defense Department to adhere to its fund obligation rates, Congress essentially restricted the DOD's rate of obligation during the last two months of FY 1992 to twenty percent of its total annual appropriation.[52]

Equipment Modifications

The Defense Department may not use FY 1992 funds to modify any aircraft, weapon, ship, or other item of equipment that a military department plans to retire or to eliminate within five years after the modification would be completed.[53] Congress, however, has not barred DOD activities from expending funds to make essential safety modifications to obsolescent equipment. Moreover, Congress has authorized the Secretary of Defense to waive this prohibition if the Secretary finds that the modification of an item is in the interest of national security and notifies the appropriate congressional committees accordingly.

Congress Continues Limitation on Cost Study Periods

Congress once again has limited the period for conducting cost comparison studies of multifunction commercial activities to forty-eight months. The time limit for studying single-function commercial activities remains twenty-four months.[54] Congress believes that these restrictions will promote timely completion of commercial activity cost studies. By no means do these provisions eliminate "contracting out." Rather, they simply prescribe a time within which an agency must complete its commercial activity cost studies.

Arab Boycott of Israel

The Defense Department may not award a contract that exceeds the statutory small purchase limitation to a foreign offeror unless the offeror certifies to the Secretary of Defense that it does not adhere to the secondary boycott of Israel.[55] The Secretary of Defense may waive this prohibition for national security reasons. Moreover, purchases of consumable supplies or services to support American or allied forces in foreign countries are exempt from this restriction.

Procurement Appropriations

For fiscal years 1992 and 1993, Congress authorized the Defense Department to spend FY 1990 procurement

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[46] *See* 10 U.S.C. §§ 2361, 2304 (1988).

[47] H.R. Conf. Rep. No. 102-328, 102d Cong., 1st Sess. 13 (1991).

[48] *Id.* at 11-12. Congress normally is more specific about the purposes for which a grantee may spend appropriations.

[49] Department of Defense Appropriations Act, 1992, § 8106, 105 Stat. at ___

[50] H.R. Conf. Rep. No. 102-328, 102d Cong., 1st Sess. 72 (1991).

[51] *Id.* at 14.

[52] Department of Defense Appropriations Act, 1992, § 8004, 105 Stat. at ___ Congress authorized only a few minor exceptions to this rule. *See id.*

[53] *Id.* § 8034, 105 Stat. at ___.

[54] *Id.* § 8069, 105 Stat. at ___.

[55] *Id.* § 8072, 105 Stat. at ___.

funds to install equipment, if these funds were available when the equipment was purchased, but were not obligated before the expiration of their periods of availability.[56]

Suspension and Debarment

Congress declined to adopt a proposal of the House of Representatives to consolidate suspension and debarment authority under the DOD Inspector General.[57] It also directed the Department of Defense to rescind a 1984 memorandum that had mandated suspension of convicted felons for at least one year unless an exemption was granted.[58] The lawmakers found that this policy might penalize defense contractors unfairly. They also noted that the policy conflicts with the "present responsibility" criterion that the Defense Advisory Panel of Government-Industry Relations recommended in January 1990.[59]

Army Depots as Subcontractors To Private Prime Contractors

Army depots now may perform as subcontractors to civilian prime contractors on DOD acquisitions. All Defense Department acquisitions of this nature must be open to competition between DOD activities and civilian firms.[60]

Desktop III

Responding to reports that a contractor (Unisys) has paid inadequate attention to Defense Department orders placed against the Desktop III computer contract, Congress prohibited additional purchases of computers under this contract after the Desktop IV contract becomes effective.[61] Congress seemed baffled that the DOD would want to extend Desktop III when the contractor has performed so poorly—particularly when better computers are available at comparable prices under Desktop IV.[62] Unisys, however, may continue production under Desktop III for some time because the Desktop IV contract currently is in the hands of the General Services Board of Contract Appeals.

The 1992 Military Construction Appropriations Act

General

President Bush signed the Military Construction Appropriations Act, 1992, (MCA Act) on October 28, 1991.[63] The MCA Act provides funding for specified military construction projects (line items), unspecified minor military construction, and military family housing.

Cost-Plus-Fixed-Fee Contracts

Congress continued to forbid DOD activities to use appropriated funds for cost-plus-fixed-fee construction contracts. This restriction applies to all contracts performed in the United States—except Alaska—in which the contract cost is expected to exceed $25,000. The Secretary of Defense, however, may waive this restriction on a case-by-case basis.[64]

Military Exercise-Related Construction

The Secretary of Defense must notify Congress before permitting the Defense Department to conduct any military exercise involving United States forces, if estimated temporary or permanent construction costs for the exercise exceed $100,000.[65]

Foreign Real Property Taxes

The Defense Department may not use military construction or family housing appropriations to pay real property taxes in any foreign nation.[66]

Contract Formation

Competition

Regulatory Changes

Federal Acquisition Regulation (FAR) section 6.302-1[67] was amended to clarify that an acquisition that is limited to a specific, brand name product does not provide for full and open competition, no matter how

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[56] *Id.* § 8076A, 105 Stat. at ___. Before FY 1990, Defense Department activities paid installation costs from operation and maintenance funds that were current at the time of installation. Presently, however, an activity must draw on procurement appropriations that are current when the equipment is funded to pay these costs.

[57] H.R. Conf. Rep. No. 102-328, 102d Cong., 1st Sess. 201 (1991).

[58] Department of Defense Appropriations Act, 1992, § 8110A, 105 Stat. at ___

[59] H.R. Conf. Rep. No. 102-328, 102d Cong., 1st Sess. 202 (1991).

[60] Department of Defense Appropriations Act, 1992, § 8137, 105 Stat. at ___ (amending 10 U.S.C. § 2208 (1988)).

[61] *Id.* § 8142, 105 Stat. at ___. Even so, Congress authorized the Department of Defense to continue the purchase of maintenance, service, peripheral equipment, and spare parts to maintain systems that already have been delivered.

[62] H.R. Conf. Rep. No. 102-328, 102d Cong., 1st Sess. 207 (1991).

[63] Pub. L. No. 102-136, 105 Stat. 637 (1991).

[64] *Id.* § 101, 105 Stat. at 641.

[65] *Id.* § 113, 105 Stat. at 642.

[66] *Id.* § 109, 105 Stat. at 641.

[67] Fed. Acquisition Circular 90-5, 56 Fed. Reg. 29,127 (1991) (effective July 25, 1991) [hereinafter FAC].

many sources actually can provide the desired product. Accordingly, a federal agency must complete a justification and approval (J&A) in accordance with FAR 6.303 and 6.304 before it may acquire a product in this manner.

Government Must Provide Same Specifications to All Offerors

After properly limiting competition under the unusual and compelling urgency exception,[68] the Defense Logistics Agency (DLA) solicited offers for pleural cavity drainage devices from two firms that recently had provided it with these items.[69] The solicitation that the DLA gave to the protester specifically stated that the units "shall be" Deknatel P/N A-8000s, while the awardee's solicitation called for Atrium P/N 2000s. Neither solicitation indicated that the government would accept "equal" products; nor did the government imply in any other way that the purchase would be competitive. The government subsequently awarded the contract to Atrium, the competitor that had extended the less costly offer. Deknatel protested, asserting that it could have provided a lower-priced model if it had known that the government would have accepted a model other than the one identified in the specifications. The General Accounting Office (GAO) sustained the protest, finding that the agency had violated the FAR[70] by failing to provide the same specifications to both offerors and by failing to indicate that "equal" products would be acceptable. This decision demonstrates that offerors are entitled to know whether the government is soliciting competitive offers.

The GAO also found an agency's actions improper in *EMS Development Corp.*[71] In this case, the Navy had initiated a sole-source acquisition with Raytheon to manufacture and install equipment in a magnetic silencing facility. The Navy provided Raytheon with a copy of the solicitation and responded in writing to Raytheon's questions about the contract specifications. After a competitor protested the Navy's decision to acquire equipment solely from Raytheon, the Navy resolicited the acquisition competitively. The competitive solicitation, however, did not include the answers that the Navy had provided to Raytheon—indeed, the Navy did not provide the answers to the protester at all. Sustaining the protest, the GAO held that the Navy's failure to provide this information to EMS Corporation had given Raytheon a distinct competitive advantage.

Contractor Appeals to Agency Competition Advocates

An agency competition advocate is responsible for challenging barriers to full and open competition in his or her procuring activity.[72] Two of this year's GAO decisions reveal the extent to which contractors should rely on competition advocate intervention for agency-level relief.[73]

In *Liebert Corp.*[74] a contractor sought the help of the Air Force competition advocate to prevent the Air Force from using an existing requirements contract to obtain items for the Federal Aviation Administration under the Economy Act.[75] After reviewing the circumstances and conversing with the procuring activity, the competition advocate agreed with the contractor and told it that the Air Force would solicit the requirement competitively. The procuring activity, however, later changed its mind. The contractor protested to the GAO. The GAO upheld the contractor's protest as timely. It declined to penalize the contractor for failing to file the appeal when it first had learned of the proposed action because it found that the contractor had refrained from filing in reasonable reliance on the competition advocate's assertions.

The GAO reached the opposite result in *Allied-Signal, Inc.*[76] In *Allied-Signal* the Air Force competition advocate had agreed only to review an alleged competition deficiency for the contractor. The GAO found that the advocate's promise to "review" the procurement did not provide the protester with reasonable cause to believe that the agency would change its position.[77]

An Agency's Decision Not to Synopsize Must Be Proper When the Agency Issues a Request for Proposal

The Army contracting office in Dhahran, Saudi Arabia, issued a solicitation for portable washers to clean vehicles and equipment used during Operations Desert Shield

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[68] 10 U.S.C. § 2304(c)(2) (1988).

[69] Comp. Gen. Dec. B-243408, July 29, 1991, 91-2 CPD ¶ 97.

[70] Fed. Acquisition Reg. 15.402(b) (Apr. 1, 1984) [hereinafter FAR].

[71] Comp. Gen. Dec. B-242484, May 2, 1991, 91-1 CPD ¶ 427.

[72] FAR 6.502.

[73] Generally, attempts to persuade an agency to change its decision do not toll the running of the protest filing period. *See* Comp. Gen. Dec. B-242703, Jan. 18, 1991, 91-1 CPD ¶ 60.

[74] Comp. Gen. Dec. B-232234.5, Apr. 29, 1991, 91-1 CPD ¶ 413.

[75] *See* 31 U.S.C. § 1535 (1988).

[76] Comp. Gen. Dec. B-243555, May 14, 1991, 91-1 CPD ¶ 468.

[77] *Accord* Comp. Gen. Dec. B-242357.2, Mar. 22, 1991, 91-1 CPD ¶ 322 (protester's continued discussions, after agency clearly had taken position that constituted adverse agency action, did not toll timeliness requirements).

and Desert Storm.[78] The contracting officer did not synopsize the acquisition in the *Commerce Business Daily* (*CBD*) because the agency needed quick delivery and local sources were available.[79] One corporation, the American Kleaner Manufacturing Company, protested, claiming that it had been denied the opportunity to compete under the solicitation because the agency improperly failed to advertise the procurement in the *CBD*. The protestor also objected that the agency ultimately accepted delivery from the awardee at an Air Force base in Delaware, rather than at Dammam, Saudi Arabia, as the agency originally had specified in its solicitation. Nevertheless, the GAO denied the protest, holding that the agency properly decided to forego advertising when it issued its solicitation.

Contractor That Prepares Portions of Statement of Work Is Disqualified From Competition

In *Ressler Associates, Inc.*[80] a contractor protested its exclusion from a National Aeronautics and Space Administration (NASA) competition for scientific and engineering support services. The NASA contracting officer initially had issued a solicitation to a contractor, but later discovered that the contractor Associates had helped write the statement of work for the contract. Having determined that the contractor would enjoy an unfair competitive advantage, the contracting officer disqualified it and canceled the RFP.[81] The GAO found that the contracting officer acted reasonably. It rejected as irrelevant the contractor's assertion that it had been unaware that it could be disqualified for having participated in writing the contract.

Poor Planning Does Not Justify Unusual and Compelling Urgency Exception

In *Service Contractors*[82] a Housing and Urban Development (HUD) lawn maintenance contract expired before the agency could award a follow-on contract. To expedite award of a new contract, the contracting officer solicited only three local small businesses. It cited as justification the "unusual and compelling urgency" exception to full and open competition, claiming that it urgently needed lawn cutting services because it would sell fewer homes if the lawns were not trimmed.[83] Service Contractors challenged its exclusion from the competition. The GAO sustained the protest. Rejecting the agency's justification and approval, it ruled that the agency's "urgency" was attributable solely to the poor planning of inexperienced contracting personnel.

Total Package Procurement for Telecommunication System Found Reasonable

Total package procurements often unduly restrict competition. Nevertheless, in *Institutional Communications Co.*[84] the GAO upheld an agency's decision to procure a state of the art telecommunications system in this manner. As part of Defense Department's telecommunications modernization project (TEMPO), the Army sought a single prime contractor to assume total performance responsibility for a proposed TEMPO system. The GAO found that the Army properly could make a single award to decrease the technical risk of obtaining a working system and to minimize disruptions from repair and maintenance.

Types of Contracts

Congress Amends R&D Contract Term Provisions

Upon proper notice to Congress, defense agencies now may award research and development (R&D) contracts for terms exceeding ten years. An agency must notify Congress if: (1) it anticipates that performance under the contract will exceed ten years; or (2) performance actually does exceed ten years and the agency previously did not notify Congress.[85] This new provision effectively abrogates the FAR five-year limitation on research and development agreements.[86]

Policy and Regulation

Office of Federal Procurement Policy Issues Services Contract Policy Statement

In April 1991, the Office of Federal Procurement Policy (OFPP) issued a significant policy memorandum that places particular emphasis on the administration and management of service contracts.[87] The memorandum

[78] Comp. Gen. Dec. B-243901.2, Sept. 10, 1991, 91-2 CPD ¶ 235.

[79] *See* FAR 5.202(a)(12) (synopsis not required for DOD if contract will be made and performed outside United States, its possessions, or Puerto Rico, and only local sources are solicited).

[80] Comp. Gen. Dec. B-244110, Sept. 9, 1991, 91-2 CPD ¶ 230.

[81] *See* FAR 9.505(b)(2) (contractor that helps prepare statement of work for services may not compete for contract to provide same services).

[82] Comp. Gen. Dec. B-243236, July 12, 1991, 91-2 CPD ¶ 49.

[83] 41 U.S.C. § 253(c)(2) (1988); FAR 6.302-2.

[84] Comp. Gen Dec. B-233058.5, Mar. 18, 1991, 91-1 CPD ¶ 292.

[85] National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 803, 105 Stat. 1290, ___ (1991) (amending 10 U.S.C. § 2352 (1988), which had authorized military departments to enter into research and development contracts for a period not to exceed five years with a five-year extension possible).

[86] *See* FAR 35.017-1(d)(2).

[87] *See* 56 Fed Reg. 15,110 (1991) (Office of Federal Procurement Policy, Policy Letter 91-2, signed Apr. 9, 1991).

stresses the need for agencies to select appropriate contracts, taking into consideration the extent to which the government can define its requirements. Ill-defined requirements lead to poor performance and must be avoided. The memorandum also advises agencies to select contract types that will motivate contractors to optimum performances, recommending that agencies provide incentives for good performance and impose appropriate price reductions for poor performance. It recommends that an agency use competitive negotiation whenever performance requirements exceed the minimum acceptable quality level and, conversely, that it use sealed bidding when the agency's goal is to obtain the lowest practicable contract price. Finally, the memorandum urges agencies to stress cost realism and past performance when they develop evaluation factors and emphasizes the desirability of using clear, performance-oriented statements of work instead of detailed "how to" specifications.[88] Curiously, although the memorandum clearly expresses the executive branch's acquisition policy, recent attempts to construe it as a binding regulation have failed.[89]

FAR Addresses Contracting for Private Sector Temporaries

The FAR now specifically authorizes contracting officers to contract for private sector temporary employees.[90] Federal agencies have had the authority to contract for private sector temporaries for some time, but until last year, the FAR provided them with no guidance on this subject.[91] The new FAR provision indicates that these services are not personal services, but also expressly forbids federal agencies to use private sector temporaries to avoid personnel laws.

GAO Approves Paperless Government Contracts

As a general rule, government contracts must be written—in part, because payment of government obligations must be supported by written evidence of a binding agreement between the government and a contractor.[92] Technology now in use in the private sector, however, enables individuals and businesses to create, transmit, review, store, and authenticate electronic documents without having to create paper copies of the electronic files. Users commonly refer to this technology as electronic data interchange (EDI).

The Comptroller General now opines that no legal impediment prevents federal agencies from relying exclusively on EDI to solicit and award government contracts.[93] Electronic "message identification codes" that conform to Federal Information Processing Standard 113[94] are the functional equivalent of handwritten signatures. Accordingly, paperless contracts are legally sufficient, as long as agencies safeguard electronic files to prevent unauthorized alterations and use appropriate message identification codes to ensure that only contracting officers actually authenticate contracts.

Limit on Length of Supply Contracts Determined By Agency's Requirements, Not Term of Contract

In a preaward protest, Delco Electronics Corporation alleged that a contract containing a forty-two month first article test period that was followed by five one-year option periods violated the five-year limitation on the length of contracts.[95] The GAO, however, carefully distinguished the duration of the contract term from the duration of the government's supply requirements. It pointed out that the FAR bars the government from entering into a supply contract for more than five years' worth of requirements. In this case, the GAO found that the total duration of the contract—eight and one-half years—was not objectionable. Reasoning that the first article test requirements were *not* a part of the government's ultimate supply, the GAO concluded that the forty-two month first article test period should not be counted in computing the five-year limitation under FAR 17.204(e).[96] Accordingly, the contract did not call on the contractor to fulfill the government's supply requirements for more than five years and thus did not violate the FAR.[97]

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[88] *Id.* at 15,111 (1991).

[89] The Comptroller General has refused to overturn solicitations or awards based upon an alleged failure to comply with the terms of the memorandum. *See, e.g.*, Comp. Gen. Dec. B-244155, Sept. 16, 1991, 91-2 CPD ¶ 247; Comp. Gen. Dec. B-244285, Sept. 23, 1991, 91-2 CPD ¶ 267.

[90] FAC 90-8, 56 Fed. Reg. 55,379 (1991) (amending FAR 37.112, effective Nov. 25, 1991).

[91] *See* 5 C.F.R. §§ 300.501 to .507 (1991).

[92] *See* 31 U.S.C. § 1501(a)(1)(A) (1988).

[93] Ms. Comp. Gen. B-238449, June 19, 1991 (unpub.). This opinion was not available on LEXIS or Westlaw.

[94] Federal Information Processing Standard 113 (National Inst. of Standards and Technology 1991). Standard 13 adopts American National Standards Institute Standard X9.9 for message authentication. These standards establish criteria for cryptographic authentication of electronically transmitted data and for the prevention of intentional or unintentional modification of data.

[95] Comp. Gen. Dec. B-244559, Oct. 29, 1991, 91-2 CPD ¶ 391. FAR 17.204(e) provides that, "unless otherwise approved in accordance with agency procedures, the total of the basic and option periods shall not exceed . . . *requirements* for five years in the case of supplies." *Id.* (emphasis added).

[96] Comp. Gen. Dec. B-244559, Oct. 29, 1991, 91-2 CPD ¶ 391.

[97] *Id.*

Sequential Exercise of Options Not Required

In *Delco Electronics* the GAO also addressed the government's exercise of nonsequential options. The solicitation, which had invited offerors to produce a modified commercial product over five option years, *specifically* authorized the nonsequential exercise of options. For example, the government could exercise the third and fifth year options regardless of whether it previously had exercised options in years one, two, and four. On review, the GAO found no regulatory or statutory provision requiring the government to exercise options in sequence. This decision, however, is uniquely fact-specific. Practitioners should not rely upon it as general authority to exercise options nonsequentially.

Cancellation of Requirements Contract Delivery Order After Issuance

In *California Bus Lines, Inc.*[98] the Armed Services Board of Contract Appeals (ASBCA) ruled that the requirements clause of a contract[99] permitted the government to cancel services that it had ordered previously. During performance of the contract, the government issued a delivery order for services. It later canceled a small portion of the order because of political unrest in the Philippines and the onset of a typhoon. The contractor protested the cancellation, contending that the government's issuance of the delivery order had been an irrevocable expression of a government requirement, which, under the requirements clause, the government was bound to obtain from the contractor. The Board, however, held that the government had cancelled the order properly. It ruled that bona fide changes in circumstances supported the government's conclusion that it no longer had a current need for the services that it had ordered.

Cost-Reimbursement Versus Fixed-Price Contracts

GAO Approves Cost-Reimbursement Requirements Contracts for Noncommercial Services

In *Astronautics Corp. of America*[100] a protester challenged an agency decision to award a cost-plus, fixed-fee requirements contract for engineering services. The protester relied on FAR 16.501(c), which authorizes agencies to award indefinite delivery, fixed-price contracts. The protester also alleged that the contract violated FAR 16.504(b), which states that agencies should use indefinite quantity contracts for commercial items or services. The GAO rejected both arguments. Ruling that the language of these two FAR provisions was permissive, rather than mandatory, it held that no per se objection exists to a cost-type, indefinite quantity contract for noncommercial services.

Cost-Reimbursement Contracts for Housing Maintenance

In *Crimson Enterprises, Inc.*[101] the GAO rejected a small business contractor's argument that a cost-plus, fixed-fee contract for family housing maintenance was improper. Crimson Enterprises argued that it successfully had performed the contact on a firm-fixed-price basis for several years and that the agency had lacked any rational reason to convert to a cost-reimbursement contract. The agency responded that it did have a good reason to change the nature of its contract, arguing that predicting the nature, quantity, and complexity of family housing maintenance tasks is extraordinarily difficult. The GAO agreed. It noted that, in the past, the agency had to negotiate a sole source modification whenever it identified an essential item of work that was not in its contract. Moreover, the contract had contained new requirements for which no prior price history existed. The GAO concluded that these uncertainties had prevented the agency from estimating performance costs with the requisite degree of certainty necessary to justify award of a fixed-price contract.

In *LBM, Inc.*[102] the protester adopted a position opposite to that of Crimson Enterprises. LBM, Inc. argued that the uncertain nature of housing maintenance requirements and the agency's refusal to allow price increases for variations from the estimated workload unfairly shifted the risk of performance to the contractor. The GAO, however, ruled that placing a substantial risk of variations in quantity on a contractor is not legally objectionable. In this case, it noted that the agency had provided the offerors with extensive historical data and that the protestor had presented no evidence that the government's choice of contract had rendered bid preparation impossible.

Fixed-Price Development Contracts

Delco Electronics, Inc.[103] advanced the proposition that an agency may award a development contract on a fixed-price basis. Delco Electronics asserted that the government's choice of a fixed-price contract had been inappropriate because of the degree of risk normally

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[98] ASBCA No. 42,181 (Aug. 21, 1991).

[99] FAR 52.216-21.

[100] Comp. Gen. Dec. B-242782, June 5, 1991, 91-1 CPD ¶ 531.

[101] Comp. Gen. Dec. B-243193, June 10, 1991, 91-1 CPD ¶ 557.

[102] Comp. Gen. Dec. B-242664, May 17, 1991, 91-1 CPD ¶ 476.

[103] Comp. Gen. Dec. B-244559, Oct. 29, 1991, 91-2 CPD ¶ 391.

associated with development endeavors. The GAO disagreed, ruling that the choice of contract type is within the sound discretion of the contracting officer. It also found that, in the instant case, the contracting officer reasonably had selected a fixed-price contract because the contract had required the contractor to apply existing, commercially available technology.

Contractor Not Liable for Design Defect in its Specification Under Production Contract

In *General Electric Co.*[104] the government accepted a contractor's design of an item and awarded the contractor a follow-on production contract. During production, however, the parties discovered latent defects in the contractor's design. On appeal, the ASBCA rejected the government's attempt to impose liability for the latent design failure under the terms of the production contract. The Board found that this contract imposed no express or implied design responsibility on the contractor. It also concluded that no liability for the design attached under *any* of the government's postacceptance remedies under the production contract. In essence, the Board decided that the contractor's design had become a government design for which the government alone was liable as a matter of law.

Sealed Bidding

Rejection of Bids

Cogent and Compelling Reason Required to Reject Responsive Bids After Bid Opening for Government Sale

The Claims Court[105] adopted a "cogent and compelling reason" standard akin to the standard that the FAR applies to federal acquisitions[106] when it considered whether an agency could reject all responsive bids after bid opening under a sealed bid government sales transaction. This is significant because the federal regulations that govern sales transactions, unlike the regulations controlling acquisition contracts, do not impose an express "cogent and compelling" standard on agencies for the rejections of responsive bids.[107] The court, however, held that acquisition law and regulations would apply if government sales regulations did not address a contested issue specifically. Accordingly, it found that a sales contracting officer could reject all the bids if the offerors had priced them unreasonably—though it also noted that this discretion is tempered by the requirement that the contracting officer have a cogent and compelling reason to reject each offer.

Integrity Certificates Required Under Indefinite-Type Contracts When Values Likely Were to Exceed $100,000

In *Service Technicians, Inc.*[108] the Navy issued a solicitation for a one-year, indefinite quantity painting contract. The solicitation established a contract minimum of $50,000 and an estimated range between $1 million and $5 million as the maximum. It also required offerors to complete procurement integrity certifications.[109] The agency found one offeror's bid nonresponsive because the offeror had failed to submit the certificate. The offeror protested. It argued that, because the solicitation had not included a specific estimated value for every order that the government would place under the contract, the contract value was $50,000—a sum below the minimum quantity for payment and performance bond requirements. The Comptroller General rejected this contention, finding that the law required an offeror to provide an integrity certificate whenever a contract value likely would exceed $100,000, whatever the contractual minimum might be.

In a similar case,[110] the protester argued that the certification requirement does not apply to an indefinite delivery contract unless the total estimated value of orders that the government eventually will place under the contract is expected to exceed $100,000. It asserted that the certification requirement did not apply in the instant case because the solicitation guaranteed only $50,000 of work. The GAO rejected the protester's argument, holding that the protester's bid of $547,000 clearly established that the expected value of the delivery orders under the contract exceeded $100,000.

Cancellation of Solicitation

Omission of Signature Line from Procurement Integrity Certificate Justifies Cancellation

In *PMB Construction—Reconsideration*[111] the GAO ruled that a contracting officer properly cancelled a solicitation after bid opening when the solicitation required

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[104] ASBCA No. 36,005, 91-3 BCA ¶ 24,353.

[105] Arthur Forman Enters. v. United States, 22 Cl. Ct. 816 (1991).

[106] *See* FAR 14.404-1(c)(6).

[107] *See* 41 C.F.R. § 101-45.000.

[108] Comp. Gen. Dec. B-243606, Aug. 7, 1991, 91-2 CPD ¶ 136.

[109] *See* FAR 52.203-8, Requirement for Certificate of Procurement Integrity (Nov. 1990) (requiring certification when value of contract exceeds $100,000).

[110] Comp. Gen. Dec. B-244660, July 10, 1991, 91-2 CPD ¶ 44.

[111] Comp. Gen. Dec. B-242221.3, Aug. 24, 1991, 91-2 CPD ¶ 181.

bidders to submit a signed certificate of procurement integrity, but the certificate included in the invitation for bids had not contained a signature line or block for bidders to complete.

When Specifications No Longer Adequately Describe Agency's Needs After Bid Opening, Cancellation Is Appropriate

The Comptroller General upheld a United States Marine Corps contracting officer's decision to cancel a solicitation for information, referral, and counseling services upon finding that the solicitation failed to meet the government's needs. After solicitation, pending a preaward survey, approximately 40,000 Marines had deployed in support of Operation Desert Shield. The contracting officer then determined that the government would require services, such as death and grief counseling and deployment-related stress counseling, that the original solicitation failed to discuss. The Comptroller General also upheld the contracting officer's determination that sealed bidding would be inappropriate because the deployment of numerous service personnel to a hostile area heightened the importance of acquiring the "highest quality counseling services."[112]

Mistake in Bid

Bid That Was Thirty-Two Percent Lower Than Government Estimate Was Insufficient to Place Contracting Officer on Notice of Mistake in Bid

In *R.J. Sanders, Inc. v. United States*[113] a contractor sued for equitable reformation of the contract, claiming that it inadvertently had entered too low a bid. The Claims Court, however, held that the $129,843 bid, considered together with other bids ranging from $157,887 to $225,225 and a government estimate of $190,000, would not have raised a "presumption of error" in the mind of a reasonable contracting officer. The court first noted that, to obtain contract reformation to correct an alleged mistake in the bidding, the plaintiff had to prove that the available facts reasonably should have raised the presumption of error in the mind of the contracting officer. In the present case, however, the mere discrepancy between bid prices did not place the contracting officer on notice of an error. Noting that the government's estimate had exceeded six of the eight bids and that the second low bid was only eighteen percent higher than the contractor's bid, the court concluded that the evidence failed to justify the contractor's reformation request.

Amendments to Solicitations—Improper Distribution Violates the Competition in Contracting Act

The Army and the General Services Administration (GSA) improperly excluded bidders from competition when they failed to provide solicitation amendments to prospective offerors. In *Republic Floors, Inc.*[114] the Army rejected the protester's bid as nonresponsive because the protester had failed to acknowledge and complete two amendments to the agency's invitation for bids (IFB). The agency inadvertently had omitted the protester from the bidder's mailing list[115] and the protester thus did not receive the amendments. The GAO specifically rejected the agency's blanket assertion that offerors are ultimately responsible for ensuring that they receive amendments in a timely manner.[116] It found, instead, that the agency's defective distribution process had prevented the protester from receiving the amendments. The GAO reached the same result in *Custom Environmental Service, Inc.*[117] in which the GSA mailed a solicitation amendment to the wrong address. The GAO ruled that by mailing the amendment to the protester's former address, the agency had failed to comply with a FAR requirement that prospective bidders be supplied with amendments.[118]

Transmission of Bid

Bidder Bears Risk of Untimely or Inaccurate Transmission of Telegraphic Bid Modification

In *Western Alaska Contractors, J.V.*[119] the contractor wished to modify its bid before bid opening.[120] It attempted to notify the government of this telephonically, through a local telegraph company. The telegraph company told the contracting specialist that it was transmitting a "bid wire." The contracting specialist misinterpreted this term to mean a telegraphic bid—which, as the specialist responded, the agency would not recognize under the terms of its solicitation. The specialist terminated the call without ever clarifying whether the telegraph company intended to transmit a modification rather than a bid. The GAO held that, by attempting a telephonic modification, the bidder had accepted the risk that its call would be misinterpreted or that it would not be received in its intended form.

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[112] Comp. Gen. Dec. B-243223, July 15, 1991, 91-2 CPD ¶ 55.

[113] 24 Cl. Ct. 288 (1991).

[114] Comp. Gen. Dec. B-242962, June 18, 1991, 91-1 CPD ¶ 579.

[115] FAR 14.205-1(c) (agency must add to mailing list the names of businesses to which it has issued invitations for bids so the agency can send them solicitation amendments).

[116] Normally, an offeror bears the risk of not receiving a solicitation amendment, unless the agency evidently failed to comply with the FAR requirements for providing notice of, and distributing, amendments. *See* Comp. Gen Dec. B-241062, Jan. 8, 1991, 91-1 CPD ¶ 18.

[117] Comp. Gen. Dec. B-242900, June 18, 1991, 91-1 CPD ¶ 578.

[118] *But see* Comp. Gen. Dec. B-232666.4, Mar. 5, 1991, 91-1 CPD ¶ 242 (protester must avail itself of reasonable opportunities to obtain documents).

[119] Comp. Gen. Dec. B-241839, Mar. 5, 1991, 91-1 CPD ¶ 248.

[120] *See* FAR 14.303(a).

Two-Step Sealed Bidding

GAO Finds No Requirement for Agency to Set Common Date for End of Step One

In *J&J Maintenance, Inc.—Reconsideration*[121] the protester argued that the government had failed to establish a common date for the submission of additional materials following the completion of the first step in a two-step acquisition prescribed by FAR 14.501. The protester conceded that the FAR is silent on this point, but argued that this requirement is manifestly necessary. The GAO rejected this position. Noting that FAR 15.611(b)(3) expressly provides a common cutoff date for receipt of best and final offers, it reasoned that the absence of a similar provision in FAR 14.501 was intentional. The GAO concluded that a common date for two-step sealed bids could not be inferred. This decision provides contract law practitioners with a helpful framework for analyzing the differences between sealed bidding rules and procedures for conducting competitive negotiations.

Proposal Evaluation in Two-Step Acquisition Must Follow Agency Plan

During a two-step sealed bidding acquisition, the Air Force rejected as technically unacceptable three of four step-one proposals it had received. Because the agency had obtained only one acceptable proposal, it continued the acquisition by negotiating with the remaining firm.[122] Although this normally would have been the proper procedure, it was inappropriate in this case because the agency had relaxed the performance schedule during its negotiations with the remaining offeror and had modified a technical requirement. Accordingly, in *Irvin Industries of Canada, Ltd. v. Department of the Air Force*,[123] the Court of Appeals for the District of Columbia overturned the award and directed the agency to resolicit. The court found the awardee's proposal technically deficient because it did not meet the requirements of the original solicitation. Significantly, the agency had accepted the awardee's offer only after it had relaxed the solicitation requirements. The court also concluded that the agency should have afforded *all* competitors an opportunity to revise their proposals to address the modified requirements.

Sealed Bidding Versus Negotiations—Use of Sealed Bidding for Unexploded Ordnance Site Survey Was Proper

In *UXB International, Inc.*[124] the Army issued an invitation for bids (IFB) to acquire site surveys for detecting unexploded ordnance. A contractor (UXB International) protested the use of sealed bidding procedures, arguing that technical considerations, such as a contractor's ability to detect ordnance, were more important than contract prices and that negotiation was essential to ensure that all the offerors bid on the same basis. The GAO observed that a federal agency must use sealed bidding procedures if the four conditions enumerated in the Competition in Contracting Act (CICA) exist.[125] In this case, the GAO found the agency's action was proper because all four CICA conditions were met. It noted specifically that the IFB contained detailed specifications, so that no discussions were necessary; that the Army reasonably decided to emphasize prices, rather than technical expertise; that time had permitted sealed bidding, and that the Army evidently had expected more than one offer. The GAO also noted that the Army had performed a preaward survey that had ensured that the low offeror was capable of performing the contract.

Negotiated Acquisitions

Negotiations provide an agency with an opportunity to select the most advantageous offer from a spectrum of cost and quality options. Many acquisition personnel, however, still conduct acquisitions as if award to the low responsive, responsible bidder is the only basis upon which to select a contractor. As noted below, this mindset may cause a number of problems. Conversely, although negotiation procedures are inherently flexible, agencies still must comply with statutory requirements and must make rational evaluation and selection decisions.

Army Revises Source Selection Procedures

The Department of the Army provided its contracting personnel with new guidance for conducting formal source selections. It added appendix AA to the Army Federal Acquisition Regulation Supplement (AFARS)[126]

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[121] Comp. Gen. Dec. B-240799.3, Apr. 23, 1991, 91-1 CPD ¶ 396.

[122] *See* FAR 14.503-1(i).

[123] 924 F.2d 1068 (D.C. Cir. 1990) (the court entered its decision on January 23, 1990, but did not publish an opinion until 1991).

[124] Comp. Gen. Dec. B-241028, Jan. 16, 1991, 91-1 CPD ¶ 45.

[125] *Accord* 70 Comp. Gen. 127 (1990). The Competition in Contracting Act provides, in pertinent part,

> [A]n agency shall solicit sealed bids if—
>
> (i) time permits the solicitation, submission, and evaluation of sealed bids;
>
> (ii) the award will be made on the basis of price and other price-related factors;
>
> (iii) it is not necessary to conduct discussions with the responding sources about their bids; and
>
> (iv) there is a reasonable expectation of receiving more than one sealed bid ....

10 U.S.C. § 2304(a)(2)(A) (1988).

[126] *See* Acquisition Letter (AL) 91-4, HQ, Dep't of Army, Mar. 8, 1991.

to provide source selection guidance for major systems and information systems acquisitions. AFARS Manual 1 contains additional instructions and sample documents.[127] Commands should tailor these new policies for application to other acquisitions.

Broad Agency Announcements

In *ABB Lummus Crest Inc.*[128] a protester challenged an agency's use of broad agency announcement procedures, alleging that the research the agency had sought to obtain by means of the announcement was not "basic" research. The Comptroller General ruled that the protest was untimely because the protester had failed to raise it before the government had received the offerors' initial proposals. This decision may prove difficult to apply in practice, however, when a broad agency announcement has an open period for submission of research proposals, or the announcement provides for preproposals ("whitepapers").

Evaluation Factors

In *C3, Inc.*[129] the GAO discussed the degree to which a solicitation must disclose the agency's evaluation scheme. The protester alleged that the disclosed evaluation factors did not specify how much extra weight the agency would afford a proposal that offered to meet certain desired requirements, rather than just the minimum requirements of the RFP. The GAO found that the evaluation factors were not ambiguous. It also held that an agency legitimately may impose some risk on offerors by not disclosing how it would weigh proposals that exceed the minimum requirements of a solicitation.

Some agencies continue to omit significant evaluation factors and subfactors from their solicitations or fail to explain the relative importance of these elements. Some commit both errors. In *St. Mary's Hospital and Medical Center of San Francisco, California*,[130] the GAO sustained a protest when the proposal evaluation committee used a number of evaluation factors that either were undisclosed or were not reasonably related to the disclosed factors.

But for the absence of prejudice—or the presence of mitigating factors—in many cases, the GAO would have sustained many similar protests this year. For example, in *High-Point Schaer*[131] the agency's RFP failed to disclose the relative importances of cost and technical factors. The GAO applied its traditional presumption that the factors had approximately equal importance and denied the protest. In *Danville-Findorff, Ltd.*[132] the agency improperly had listed the relative importance of one factor as "sixty" in the RFP, but had assigned the factor a value of "forty" during the actual evaluation. The agency assigned the "extra" twenty points to an unannounced evaluation factor. The GAO, however, did not grant relief. It noted that, even if the agency had evaluated the proposals using the announced criteria, the protester would not have received award.

Evaluations

Selection of Evaluators

In *Advanced Management, Inc.*[133] the General Services Board of Contract Appeals (GSBCA) announced that it would review an agency's selection of evaluators for abuse of discretion, fraud, and actual bias. This is one area in which the GSBCA has adopted the more deferential GAO standard of review.[134] In *TRW Inc.*[135] the agency used an evaluator who was a close friend of one offeror's corporate officials. The GSBCA concluded that the appearance of impropriety that this relationship had created violated DOD and agency regulations. The Board, however, refused to grant relief, finding that the relationship actually had not harmed the protester.

Cost Evaluations

In *Planning Research Corp.*[136] the GSBCA declared that it will apply an "abuse of discretion" standard to its reviews of cost realism determinations. In an interesting footnote to this decision, the Board observed that a contract that is tied up in constant litigation cannot be performed adequately.[137] This observation implies that a proposer's litigation history may be a relevant evaluation factor.

Even under *Planning Research Corp.*'s deferential standard, the government must introduce some evidence of the reasonableness of its cost evaluations. In *Dyna-*

[127] Army Fed. Acquisition Reg. Supp., Manual 1 (Mar. 1991). Appendix AA refers to this manual, but the manual is available separately.

[128] Comp. Gen. Dec. B-244440, Sept. 16, 1991, 91-2 CPD ¶ 252.

[129] Comp. Gen. Dec. B-241983.2, Mar. 13, 1991, 91-1 CPD ¶ 279.

[130] Comp. Gen. Dec. B-243061, June 24, 1991, 91-1 CPD ¶ 597.

[131] Comp. Gen. Dec. B-242616, May 28, 1991, 91-1 CPD ¶ 509.

[132] Comp. Gen. Dec. B-241748, Mar. 1, 1991, 91-1 CPD ¶ 232.

[133] GSBCA No. 11,257-P, 91-3 BCA ¶ 24,065.

[134] *See, e.g.*, Comp. Gen. Dec. B-240847, Dec. 17, 1990, 90-2 CPD ¶ 494 (composition of source selection evaluation board is within discretion of agency; thus, GAO will review only allegations of fraud, bad faith, or conflict of interest).

[135] GSBCA No. 11,309-P, ___ BCA ¶ ___, 1991 BPD ¶ 205.

[136] GSBCA No. 10,697-P, 91-2 BCA ¶ 23,881.

[137] *Id.* 91-2 BCA at 119,630 n.11.

Lantic v. United States,[138] for instance, the agency relied on an efficiency standard for lines of code per-programmer per-day to find the protester's proposed costs of writing software unreasonably low. The GSBCA agreed,[139] concluding that the protester deliberately had submitted a "low-ball" cost proposal in the hopes of receiving award. The agency, however, had failed to disclose the efficiency standard to the proposers. Moreover, on appeal, the agency introduced no credible evidence that the standard actually was reasonable. Indeed, the standard essentially derived from the decree of a general officer who was untrained in software development. The protester's expert testimony showed that its proposed standard actually was within the zone of reasonableness. Accordingly, the Federal Circuit reversed the GSBCA, finding no rational basis to conclude that the protester's proposal had been unreasonable.

In *All Bann Enterprises, Inc.*[140] the GAO emphasized that the government owes an obligation carefully to review and to adjust cost proposals for cost-reimbursement contracts. When an offeror's proposed costs differ significantly from the government's cost estimate, the government should discuss the deficiency with the offeror.

In *Group Technologies Corp.*[141] the GAO sustained a protest against the cost evaluation of proposals submitted for a time and materials contract. The GAO concluded that the agency had erred in failing to consider the estimated costs of performing various hypothetical tasks because different levels of effort for technically equivalent proposals often result in materially different costs for equivalent amounts of work. Conversely, in *PCT Services, Inc.*[142] the GAO upheld an agency's decision to add phase-in costs to proposals submitted by non-incumbents because the agency previously had disclosed its intention to add these costs in the RFP.

Technical Evaluations

In *Integrated Systems Group, Inc.*[143] the protester proposed to supply an agency with the same model of computer that had been offered by two other contractors. The contracting officer, however, excluded the protester from the competitive range, claiming that its proposal had failed to show that the product complied with the agency's specification. The GSBCA reversed the decision. It found that the information available to the contracting officer clearly indicated that the protester had a reasonable chance of receiving award.

In *Trijicon, Inc.*[144] the agency had adopted a color scoring scheme comprised of acceptable (green), marginal (yellow), and unacceptable (red) ratings. The agency scored proposals that exceeded minimum requirements no higher than those that merely offered the minimum. The agency's solicitation, however, did not disclose this. Instead, it related the agency's minimum requirements and advised offerors that technical quality was more important than cost. On review, the GAO found the agency's evaluation improper because its rating scheme failed to comport with the disclosed criteria—which, in essence, had stated that the government would pay more for technically superior proposals.

In *Quantum Research, Inc.*[145] the protester proposed a 2600-hour work year—at a rate of fifty work-hours per week—on an engineering and technical assistance contract. The agency properly downgraded the technical proposal because it reasonably concluded that, under these conditions, the protester's employees would perform poorly and that the protester probably would suffer a significant turnover in personnel.

Evaluating Responsibility Factors

Agencies now more frequently include responsibility evaluation factors, such as financial capacity and past performance, in their solicitations. In adopting these factors, however, they tend to make several common mistakes.

In *Clegg Industries, Inc.*[146] the agency evaluated offerors' responsibility factors using pass or fail scoring. The GAO held that comparative evaluation of responsibility factors was proper, but warned that the use of absolute criteria would require the contracting agency to refer negative evaluations of small businesses to the Small Business Administration (SBA) for a certificate of competency. In a similar case,[147] the agency found that

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[138] No. 91-1162, 10 FPD § 103 (Fed. Cir. 1991). The Federal Circuit's procedural rules provide that this decision may not be cited as precedent. *See* Fed. Cir. R. 47.8.

[139] DynaLantic Corp., GSBCA No. 10,956-P, 91-1 BCA ¶ 23,665.

[140] Comp. Gen. Dec. B-242751, June 3, 1991, 91-1 CPD ¶ 521.

[141] Comp. Gen. Dec. B-240736, Dec. 19, 1990, 90-2 CPD ¶ 502.

[142] 70 Comp. Gen. 111 (1990).

[143] GSBCA No. 11,156-P, 91-2 BCA ¶ 23,961.

[144] Comp. Gen. Dec. B-244546, Oct. 25, 1991, 91-2 CPD ¶ 375.

[145] Comp. Gen. Dec. B-242020, Mar. 21, 1991, 91-1 CPD ¶ 310.

[146] Comp. Gen. Dec. B-242204.3, Aug. 14, 1991, 91-2 CPD ¶ 145.

[147] Comp. Gen. Dec. B-238367.5, Aug. 28, 1991, 91-2 CPD ¶ 210.

the protester's proposal exhibited unacceptably high risk. It had based its risk assessment primarily on responsibility factors. The solicitation's evaluation factors, however, had failed to disclose that the agency would consider responsibility factors. Accordingly, the GAO found that the contracting officer should have referred the negative evaluation to the SBA. These decisions demonstrate that agencies should take care to provide for comparative evaluation of disclosed factors, when appropriate.

A second problem area concerns the choice of evidence for comparative evaluations of an offeror's responsibility. In *Cavalier Computing*[148] the financial stability of offerors was a significant evaluation factor. The solicitation expressly required offerors to submit audited financial statements. The awardee, however, responded that an audited statement was not available. It submitted only a partial, unaudited financial statement and the audited statement of a parent corporation. Other offerors submitted audited statements. The GAO held that the agency had no reasonable basis to conclude that the awardee had a strong financial position, especially when the "unavailable" unaudited statement revealed real financial problems. On the other hand, in *KMS Fusion, Inc.*,[149] the agency properly considered extrinsic evidence of the protester's past performance when past performance had been a disclosed evaluation factor. Indeed, the GAO observed the agency properly could not have ignored extrinsic evidence of the protester's poor past performance.

Agencies should make rational, not mechanical, comparative evaluations of past performance. In *Retrac*[150] an agency proposed to acquire spare parts at a higher price ($31,000) because a paperwork problem on a $112 order from a previous contract had caused the lowest price offeror to miss a quality vendor program cutoff score. On review, the GAO concluded that the agency's evaluation had been unreasonable.

Records of Evaluations

Agencies should create and retain records of proposal evaluations that are sufficient to show the reasonableness of their evaluations. In *Hydraudyne Systems and Engineering B.V.*[151] the agency technically violated FAR 4.801(b) and 15.608(a)(2) by destroying the notes of individual evaluators. The GAO, however, found that the agency's source selection records were adequate to show that the agency's evaluation had been proper because the assigned point scores were accompanied by contemporaneous comments that the evaluators had prepared as part of a summary evaluation. Even so, the GAO pointedly noted that it has reached contrary conclusions on slightly different facts in past decisions[152] and admonished the agency not to repeat its error.

In *TFA, Inc.*[153] the GAO sustained a protest when the evaluation record failed to explain why evaluators had assigned different scores to proposals with identical defects. Similarly, in *S-Cubed*[154] the record included no explanation of why the agency had considered acceptable a "low-ball" proposal on a cost-reimbursement contract. The agency initially had deemed the proposal very unrealistic because it contained many cost elements that were much lower than the agency estimate or the other proposals. In *S & M Property Management*[155] the evaluation record included only point scores without additional evidence to reveal how the agency had assessed the scores. The GAO sustained the protest because it found no evidence that the agency evaluation had been reasonable.

Award Without Discussion

Last year we reported that Congress had empowered the Department of Defense to award on initial proposals to contractors other than the low-cost offerors. Both the FAR[156] and the Defense Federal Acquisition Regulation Supplement (DFARS)[157] now include implementing guidance for this procedure. The FAR provision prescribes alternate solicitation terms. An agency may select either term, depending on whether the agency intends to hold discussions.[158]

The new statute first was tested in *Federal Systems Group, Inc.*[159] The protester had submitted an initial pro-

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[148] Ms. Comp. Gen. B-244697, Nov. 12, 1991.

[149] Comp. Gen. Dec. B-242529, May 8, 1991, 91-1 CPD ¶ 447.

[150] Comp. Gen. Dec. B-241916, Mar. 1, 1991, 91-1 CPD ¶ 239.

[151] Comp. Gen. Dec. B-241236, Jan. 30, 1991, 91-1 CPD ¶ 88. *Accord* Comp. Gen. Dec. B-242529, May 8, 1991, 91-1 CPD ¶ 447.

[152] *See, e.g.*, Comp. Gen. Dec. B-236834.3, July 20, 1990, 90-2 CPD ¶ 53.

[153] Comp. Gen. Dec. B-243875, Sept. 11, 1991, 91-2 CPD ¶ 239.

[154] Comp. Gen. Dec. B-242871, June 17, 1991, 91-1 CPD ¶ 571.

[155] Comp. Gen. Dec. B-243051, June 28, 1991, 91-1 CPD ¶ 615.

[156] FAC 90-7, 56 Fed. Reg. 41,733 (1991) (amending FAR 15.610, effective Aug. 22, 1991).

[157] Defense Acquisition Circular (DAC) 88-18, 56 Fed. Reg. 15,164 (1991) (amending Defense Federal Acquisition Regulation Supplement 215.610, effective Mar. 15, 1991).

[158] FAR 52.215-16, alternate II (Aug. 1991) (with discussions); *id.*, alternate III (without discussions).

[159] GSBCA No. 11,461-P (Nov. 21, 1991).

posal in which it had offered to comply with all terms and conditions, but also had included in this proposal an extensive list of "exceptions and clarifications." The proposal, including its list of exceptions, deviated from the mandatory requirements in three material areas. The next lowest, technically acceptable proposal was only $9000 higher. The agency awarded the contract to the second low offeror without conducting discussions. In reviewing this award, the GSBCA found that the cost of holding discussions would have outweighed the savings the agency would recovered by awarding to the protester. Considering this fact, together with the statute's unambiguous language and its legislative history, the Board concluded that the agency's award on initial proposals had been proper.

In *Cylink Corp.*[160] the Comptroller General found that questions that the agency had directed to one offeror on warranty and delivery terms were not "clarifications" because the offeror's answers effectively had modified the initial proposal. Therefore, the agency should not have awarded the contract on initial proposals. Instead, it should have conducted discussions with all offerors in the competitive range.

Competitive Range Determinations

In *Unisys Corp.*[161] the GSBCA adopted an abuse of discretion standard to review protests of an agency's decision to include an offeror in the competitive range. The Board gave substantial deference to regulations[162] that directed the agency to include offerors in the competitive range in close cases.

In *HSI-CCEC*[163] the GAO held that an agency erroneously had excluded a marginal, but acceptable, proposal from the competitive range without considering the proposed contract price. Similarly, it found error in *National Systems Management Corp.*[164] when the agency made a cost and technical tradeoff between two proposals, leaving only one proposal in the competitive range. Both offers were actually acceptable, and the agency's decision to consider only one of them received the GAO's strict scrutiny. These decisions demonstrate that an agency's better course of action is to include doubtful proposals in the competitive range.

Discussions

Over the past year, several decisions have examined practices that agencies may not employ during discussions. In *Contact International Corp.*,[165] for instance, a protester alleged that technical transfusion occurred when the contracting officer permitted a competitor of the protestor to make an unannounced visit to a government owned, contractor operated dairy plant. The GAO found that the incumbent protester had had no right to notice of the competitor's visit. In *Technical Assessment Systems, Inc.*[166] the GAO found that an agency did not disclose the protester's ideas improperly. In so ruling, the GAO noted that the protester had submitted advertising material without *any* claim of confidentiality and that the agency merely had asked another contractor to develop software similar to the product described in the advertisements.

The GSBCA found that an agency had conducted an illegal auction in *International Business Machines Corp.*[167] In response to an agency protest, the agency had reopened discussions and had sought another round of BAFOs. The protester, however, had not alleged, and the agency did not admit, that any error in the evaluation or in the solicitation justified reopening the discussions. Finding that the agency had reopened the discussions erroneously, the GSBCA rescinded the call for a second round of BAFOs.

The GAO did not find an auction in *General Projection Systems.*[168] In this case, the agency had announced an award to General Projection Systems on initial proposals but had not revealed the contract price. After an unsuccessful offeror protested to the agency, the agency decided to seek BAFOs after correcting an error prejudicial to that protester. In preparing its BAFO, the offeror that had protested to the agency lowered its price and won the award. Noting that an offeror normally must expect at least one call for BAFOs, the GAO concluded that this was not an improper auction because the agency had not disclosed the award prices. In *Food Services, Inc.*[169] another protester likewise alleged that an agency had conducted an illegal auction, claiming that repeated discussions had prompted it to raise its unrealistically low price. The GAO again concluded that no auction occurred. It found that the government had done nothing more than conduct reasonable discussions by identifying deficiencies.

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[160] Comp. Gen. Dec. B-242304, Apr. 18, 1991, 91-1 CPD ¶ 384.

[161] GSBCA No. 11,069-P, 91-2 BCA ¶ 23,879.

[162] FAR 15.609(a).

[163] Comp. Gen. Dec. B-240610, Dec. 7, 1990, 90-2 CPD ¶ 465.

[164] Comp. Gen. Dec. B-242440, Apr. 25, 1991, 91-1 CPD ¶ 408.

[165] 70 Comp. Gen. 115 (1990).

[166] Comp. Gen. Dec. B-242436, May 3, 1991, 91-1 CPD ¶ 432.

[167] GSBCA No. 11,324-P, ___ BCA ¶ ___, 1991 BPD ¶ 224.

[168] 70 Comp. Gen. 137 (1990).

[169] Comp. Gen. Dec. B-241408, Feb. 12, 1991, 91-1 CPD ¶ 150.

Unequal Treatment

In *Grumman Data Systems Corp. v. Stone*[170] an agency distributed the answers to questions about the solicitation as amendments to the solicitation. The agency, however, chose not to disclose the questions in these amendments. Standing alone, the answers were misleading and provided an unfair advantage to one offeror. Consequently, the Court of Appeals for the District of Columbia found that the amended solicitation was defective and concluded that the award had been improper.

During discussions, the agency in *SeaSpace*[171] told one of four offerors in the competitive range that the agency preferred a more powerful computer to satisfy its requirement. The offeror then proposed the preferred computer in its best and final offer, significantly improving its score over the other offerors, which had not been aware of the agency's preference. The GAO, like the appeals court in *Grumman Data Systems Corp.*, upheld the protest. It concluded that the government wrongfully failed to treat all the competitors equally.

In *CompuChem Laboratories, Inc.*[172] the agency had required offerors to perform laboratory tests correctly as a precondition to award. The apparently successful awardee actually performed the tests incorrectly, but the agency allowed it a second opportunity to perform. A competitor challenged this second test, alleging that the agency had not treated all the offerors equally. The GAO, however, observed that "equally" does not mean "identically." It added that contracting officers normally should apply pass or fail benchmarks flexibly to permit otherwise acceptable offerors to correct deficiencies through discussions. In this case, it held, the agency's actions had been consistent with this approach.

In *ITT Electron Technology Division*[173] the GAO found that the agency had treated an offeror unfairly when its contracting officer had allowed a competitor to submit a quality assurance plan as an appendix to its proposal. By permitting this action, the agency effectively had waived for one offeror the limitation on the length of proposals that it had imposed in the solicitation and, therefore, had prejudiced the protester unfairly. Similarly, in *RGI, Inc.*,[174] the agency informed one proposer of weaknesses in its proposal without extending the same favor to the protester. The GSBCA found that this had afforded one offeror an unfair competitive advantage.

Source Selection

In *Newport News Shipbuilding & Dry Dock Co. v. Department of Navy*[175] a district court ruled that the Under Secretary of Defense for Acquisition had failed to follow the evaluation factors set forth in the solicitation and in relevant provisions of an appropriations act when he directed award to the low priced offeror in a solicitation. The court discussed in detail congressional actions concerning the system in question and the Under Secretary's role in evaluating offers and in awarding contracts. The decision is noteworthy because it held that a senior agency manager must follow announced evaluation criteria.

In *PharChem Laboratories, Inc.*[176] the disclosed evaluation criteria and their relative weights (eighty points for technical merit and twenty points for contract price) implied that the government desired a technically superior offer. Although one proposal was far superior to all others, the source selection authority declared a tie and awarded the contract to a slightly lower priced offeror. Reviewing the case, the GAO directed the agency to award the contract to the higher rated offeror because the agency had offered no rationale for not accepting the higher quality proposal at a slightly higher price.

Small Purchases

Government-Wide Credit Card Program

The federal government recently initiated a new small purchase procedure. Last year, the General Services Administration awarded a federal schedule contract (GS-00F-06010) to Rocky Mountain National Bank for credit card services. Essentially, agencies now may use credit cards under restrictions similar to those governing the use of Standard Form 44. As implemented by the Army, authorized persons may make single purchases for immediate delivery within specified dollar thresholds.[177] The Army also imposed specific training requirements for credit card holders.

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[170] No. 91-1379 (D.D.C. June 28, 1991), 37 Cont. Cas. Fed. (CCH) ¶ 76,179.

[171] Comp. Gen. Dec. B-241564, Feb. 15, 1991, 91-1 CPD ¶ 179.

[172] Comp. Gen. Dec. B-242889, June 17, 1991, 91-1 CPD ¶ 572.

[173] Comp. Gen. Dec. B-242289, Apr. 18, 1991, 91-1 CPD ¶ 383.

[174] GSBCA No. 11,348-P, ___ BCA ¶ ___, 1991 BPD ¶ 231.

[175] 771 F. Supp. 739 (E.D. Va. 1991).

[176] Comp. Gen. Dec. B-244385, Oct. 8, 1991, 91-2 CPD ¶ 317.

[177] *See* Acquisition Letter 91-12, HQ, Dep't of Army, 25 Nov. 1991 (adding subpart 13.90 to the Army Federal Acquisition Regulation Supplement (AFARS)). Contracting officers may make purchases up to the small purchase threshold; the limit for other authorized card holders is $2500. *See* AFARS 13.9003(c).

Imprest Funds

In July 1991, the Comptroller General approved the use of imprest funds to reimburse an individual who spent her own money to acquire goods for a federal agency.[178] This decision essentially authorizes agencies to reimburse employees for necessary purchases to the extent that its imprest fund regulations actually permit reimbursements of this nature. Interestingly, the GAO did not discuss the voluntary creditor rule in its decision[179]—perhaps because the employee in the instant case apparently was imbued with some authority to make emergency purchases.

Synopsis Requirements

Federal Acquisition Circular 90-7[180] amended FAR 5.101(a) and FAR 5.205(d)(1) to delete the requirement for agencies to synopsize noncompetitive contract actions between $10,000 and the small purchase threshold.

Small Purchase Threshold

As discussed above,[181] Congress permanently raised the small purchase threshold to $100,000 for acquisitions in support of specified military contingency operations.[182] In *Service Contractors*[183] a civilian agency, acting on its own initiative, also attempted to raise the threshold for small purchases. Faced with an inevitable, but unplanned for, contract expiration, the agency used small purchase procedures to solicit for a $50,000 requirement. The GAO, however, later ruled that small purchase procedures were not appropriate for this acquisition because its estimated cost exceeded the small purchase threshold.

Commercial Activities Program

Federal Employees and Their Unions May Challenge Contracting-Out Decisions

In a 1987 decision, the Federal Labor Relations Authority (FLRA) ordered the Internal Revenue Service (IRS) to bargain with the National Treasury Employees Union (NTEU) over a union proposal. The NTEU had proposed a negotiated grievance procedure that would constitute the internal appeals procedure specified by Office of Management and Budget (OMB) Circular A-76 for resolving "contracting-out" disputes.[184] The IRS appealed the FLRA order. The Supreme Court eventually reversed the order, remanding the case to the court of appeals "to await [FLRA's] specification ... of the particular permissible interpretation of 'applicable laws' (if any) it believes embraces the Circular."[185] The FLRA responded promptly. Observing that "regulations accorded the force and effect of law are binding law governing the agency's decisions which must be followed,"[186] it declared that OMB Circular A-76 has the force and effect of law and concluded that federal employees and their unions may challenge contracting-out decisions through arbitration by alleging violations of the circular.[187]

Sixth Circuit Holds Contracting-Out Decisions Are Reviewable

The Sixth Circuit Court of Appeals apparently agrees with the FLRA that OMB Circular A-76 is binding on agencies.[188] In 1988, the Army contracted out dining facility operations at Fort Knox, Kentucky. Army civilian food service workers sued to overturn the contract, alleging that the Army's cost comparison had been defective.[189] The district court dismissed the suit, finding that the decision to contract out was "committed to agency discretion" and was not reviewable under the Administrative Procedures Act.[190] On appeal, the Sixth Circuit reversed. Finding that "a complex scheme of statutes and regulations" governs contracting-out decisions,[191] the court declared, "In the regime as a whole, with its directives to procure commercial supplies and services economically and save money for the taxpayer, we find law to apply ... [and] standards ... [that] confine an agency's action in making the contracting-out decision."[192] Accordingly, the court concluded that the government's decision to contract-out was reviewable under the Administrative Procedures Act.[193]

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[178] Ms. Comp. Gen. B-242412, July 22, 1991 (unpub.).

[179] *See* 70 Comp. Gen. 153 (1990); 62 Comp. Gen. 419 (1983) (holding that a voluntary creditor is one that uses personal funds to pay what it perceives to be valid obligation of government).

[180] 56 Fed. Reg. 41,728 (1991) (effective Aug. 22, 1991).

[181] *See supra* notes 21-22 and accompanying text.

[182] National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. 102-190, § 805, 105 Stat. 1290, ___ (1991).

[183] Comp. Gen Dec. B-243236, July 12, 1991, 91-2 CPD ¶ 49.

[184] National Treasury Employees Union, 27 F.L.R.A. 976 (1987).

[185] Department of Treasury, Internal Revenue Serv. v. Federal Labor Relations Auth., 494 U.S. 922 (1990) (law allows unions to enforce only limitations contained in applicable statutes).

[186] National Treasury Employees Union, 42 F.L.R.A. 377 (1991).

[187] *Id.*; *accord* Department of Educ. Council of Am. Fed'n of Gov't Employees Locals, 42 F.L.R.A. 1351 (1991).

[188] Diebold v. United States, 947 F.2d 787 (6th Cir. 1991).

[189] The court declined to address whether the plaintiff employees have standing in the case. *See id.* at 811 n.16.

[190] *See id.* at 787 (the decision of the District Court for the Western District of Kentucky to dismiss the appeal is unpublished and does not appear in Westlaw or LEXIS). *See generally* 5 U.S.C. § 701(a)(2) (1988).

[191] *Diebold*, 947 F.2d at 789.

[192] *Id.* at 790.

[193] *Id.* at 810-11.

Nonappropriated Fund Instrumentalities

Implied Waiver of Sovereign Immunity

In *McDonald's Corp. v. United States*[194] the Federal Circuit held that the Claims Court could exercise Tucker Act[195] jurisdiction over a contract awarded by the Navy's Resale and Services Support Office, a nonappropriated fund instrumentality (NAFI) of the United States. For purposes of Tucker Act jurisdiction, the United States expressly waived sovereign immunity with respect to an enumerated list of NAFIs, including the Navy exchanges.[196] Looking to the history behind the sovereign immunity waiver[197] and to the history of the Navy Exchange,[198] the court found that the Resale and Services Support Office actually is a Navy exchange within the meaning of the Tucker Act.[199]

Certification of Claims Under NAF Disputes Clause

In *Mystech Associates, Inc.*[200] the ASBCA found that it had jurisdiction over an uncertified claim in excess of $50,000 that arose from a nonappropriated fund (NAF) contract. The contract contained a NAF disputes clause that designated the ASBCA as the appellate forum but did not require certification of claims in excess of $50,000.[201] While the government conceded that the Contract Disputes Act did not apply to the contract, it asserted that agency regulations[202] required certification. The Board rejected this argument, holding that the language of the contract and the ASBCA's charter[203] clearly defined the Board's jurisdiction over NAF disputes. Because neither the charter, nor the contract, required certification of the claim, the Board had jurisdiction to review the uncertified claim.

Disappointed Bidders' Remedies

The most significant development of the past year in the area of disappointed bidders' remedies is the General Accounting Office's (GAO) revision of its bid protest rules.[204] DFARS part 233 was revised expressly to reflect the new GAO rules.[205] Nevertheless, the decisions announced in adjudications since these changes became effective on April 1, 1991, are not dramatically different from prior decisions.

Revisions to the GAO's Bid Protest Rules

Document Production

The GAO has eliminated agency discretion to withhold documents that might provide a competitive advantage or that are otherwise exempt from release.[206] The revised rules require agencies to include *all* relevant documents in their administrative reports.[207] The protester and all interested parties may demand complete copies of any report that an agency submits to the GAO. To balance the competing interests of protecting sensitive information, such as trade secrets and legitimate confidential commercial or financial information, and ensuring that protesters enjoy full access to the information they need to pursue their protests, the GAO created a protective order to limit a protester's access to sensitive data.[208]

Protective Orders

If the GAO issues a protective order, access to sensitive information will be limited to counsel, independent experts, and consultants for the protester and other interested parties. Counsel may obtain access to protected information only if they are not involved in the corporate decision-making processes of their clients.[209] A party seeking a protective order must file a request with the GAO no later than twenty days after the filing of the protest. If the agency fails to release all relevant documents in compliance with GAO's discovery rules, the GAO: (1) may provide the documents sua sponte; (2) may draw adverse inferences from the agency's noncompliance; (3) may forbid the agency to use, or to refer to, the document

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[194] 926 F.2d 1126 (Fed. Cir. 1991).

[195] *See* 28 U.S.C. § 1491 (1988) (corresponds to Tucker Act, ch. 359, § 1, 24 Stat. 505 (1887)).

[196] 28 U.S.C. § 1491(a)(1) (1988).

[197] *McDonald's Corp.*, 926 F.2d at 1127-28.

[198] *Id.* at 1128-31.

[199] *Id.* at 1133.

[200] ASBCA No. 39,105, 91-3 BCA ¶ 24,127.

[201] The Contract Disputes Act requires certification of claims over $50,000. *See* 41 U.S.C. § 605 (1988). Boards lack jurisdiction over uncertified claims in excess of $50,000. *See, e.g., United States v. Grumman Aerospace Corp.*, 927 F.2d 575 (Fed. Cir.), *cert. denied*, 112 S. Ct. 330 (1991).

[202] Dep't of Defense Directive 5515.6, Processing Tort, Contract and Compensation Claims Arising out of Operations of Nonappropriated Fund Activities (Nov. 3, 1956). This directive requires NAFIs to use appropriated fund procedures to process all NAF contract claims.

[203] *See* DFARS, app. A.

[204] 56 Fed. Reg. 3579 (1991).

[205] DAC 88-19, 56 Fed. Reg. 60,066 (1991).

[206] *See* 4 C.F.R. § 21.3(d)(2) (1991). This provision formerly permitted agencies to withhold information exempt from release under the Freedom of Information Act.

[207] 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.3(c)).

[208] *Id.* (to be codified at 4 C.F.R. § 21.3(d)).

[209] *Id.* (to be codified at 4 C.F.R. § 21.3(d)(3)).

or the argument it supports; or (4) may impose other appropriate sanctions.

Hearing Procedures

The GAO replaced the bifurcated structure of informal and fact-finding conferences[210] with a single hearing procedure.[211] The revised rules permit the agency, the protester, an interested party, or even the GAO to request a hearing. The rules also allow prehearing conferences.

Award of Attorneys' Fees and Protest Costs

The new rules provide that, if an agency takes corrective action in response to a protest, the GAO may award the protester attorneys' fees and protest costs, no matter when the agency actually initiates the corrective action.[212] This is a significant departure from well-established GAO case law, under which a protester could not recover attorneys' fees or costs if the agency took corrective action before the GAO announced its decision.[213]

Timeliness of Protests

The revised rules require protesters to include in their protests sufficient information to establish that the protests are timely. The GAO may dismiss protests that do not contain this information. The revised rules prohibit a protester from presenting evidence for the first time in a request for reconsideration that the protest actually is timely.[214]

Department of Justice Challenges Bid Protest Attorneys' Fees Provision

The Department of Justice filed suit[215] to challenge the constitutionality of the GAO's power to award attorneys' fees and costs in bid protests. The GAO's present authority to award fees to successful protesters derives from the Competition in Contracting Act (CICA).[216] Both parties have filed motions for summary judgment. The Federal Acquisition Regulatory Council has amended FAR 33.104 to allow the government to recover attorneys' fees if the court upholds the Justice Department's position.[217]

Army Materiel Command Introduces Agency Protest Procedure

The United States Army Materiel Command (AMC) adopted a structured agency protest procedure to reduce bid protest litigations. Under this procedure, an agency agrees to withhold award or performance and to decide the protest within twenty days. In return, the protester agrees not to file any other actions until the agency decides the protest. The protester may ask either the AMC Command Counsel or the contracting officer to decide the protest. This procedure offers the protester an inexpensive, quick, and independent review of a contracting officer's decision.

Significant GAO Disappointed Bidder Decisions

Protective Orders Under the Revised Rules

In *Westinghouse Electric Corp.*[218] the GAO issued a protective order covering documents that the agency believed were exempt from disclosure under the Freedom of Information Act (FOIA).[219] The agency argued that the order did not provide adequate safeguards for information that may be withheld under FOIA and refused to turn the documents over to the protester. Subsequently, the agency surrendered all of the documents to the GAO, along with summaries of the documents. The GAO then provided the summaries, but not the actual documents, to the protester.[220] The protest decision cited above did not discuss the issue of compliance with the protective order.

Standards for Counsel to Obtain Access under Protective Order

In *Matsushita Electric Industrial Co. v. United States*[221] the Court of Appeals for the Federal Circuit

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[210] *See* 4 C.F.R. § 21.5 (1991).

[211] *Id.* (to be codified at 4 C.F.R. § 21.5).

[212] *Id.* (to be codified at 4 C.F.R. § 21.6(e)).

[213] *See* Comp. Gen. Dec. B-235512.2, May 31, 1989, 89-1 CPD ¶ 524; Comp. Gen. Dec. B-218241, June 18, 1985, 85-1 CPD ¶ 696.

[214] 56 Fed Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.2(b)).

[215] United States v. Instruments, S.A., No. 91-1574 (D.D.C. filed June 26, 1991). The suit is based upon a separation of powers argument flowing from the Supreme Court's decisions in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), and *Bowsher v. Synar*, 478 U.S. 714 (1986).

[216] 31 U.S.C. § 3554 (1988).

[217] *See* 56 Fed. Reg. 28,652 (1991); 56 Fed. Reg. 37,260 (1991).

[218] Comp. Gen. Dec. B-244339, Oct. 10, 1991, 91-2 CPD ¶ 326.

[219] 5 U.S.C. § 552 (1988).

[220] 56 Fed. Contr. Rep. (BNA) 276 (Aug. 19, 1991).

[221] 929 F.2d 1577, 1580 (Fed. Cir. 1991).

articulated a two-part process for evaluating whether in-house counsel may receive information covered by a protective order. First, the court must review the facts to determine whether release to in-house counsel would create a risk of subsequent, improper disclosure to corporate decision-makers. Second, the court must determine whether the in-house counsel actually participates in the corporation's competitive decision-making process. Significantly, a court may not deny an attorney access to information solely because the attorney is an in-house counsel or has regular "contacts" with a corporate decision-maker.

In-House Counsel and Protective Orders

In *TRW, Inc.*,[222] the GAO faced a complex situation involving access of in-house counsel to protected information. TRW, Inc. (TRW) asked the GAO to permit three in-house counsel to review the data. The first attorney was one of two general legal counsel that regularly advised TRW's personnel on government contracts issues. Although the individual was not a corporate competitive decision-maker, the GAO opined that the attorney inadvertently might disclose protected material to competitive decision-makers because one of the attorney's primary "clients" was a corporate vice president. The second attorney was the advisor to TRW's vice president for financial affairs—an officer whose responsibilities included contract pricing and cost accounting. The GAO deemed this attorney a participant in the corporation's competitive decision making process. The third in-house counsel was an employment and litigation lawyer who normally worked on real estate matters, insurance claims, and mergers. This attorney ordinarily was not involved in the corporation's government contract business. The GAO allowed the litigation counsel access to the information, but refused to grant access to the protected material to the first two individuals.[223]

Protective Orders and Retained Counsel

In *Mine Safety Appliances Co.*[224] the GAO granted access to information covered by a protective order to members of a law firm that had been retained to represent the protester. The successful offeror objected, pointing out that the managing partner of the firm also served on the protester's board of directors. On review, the GAO observed that its standard for granting access to protected information for retained counsel is the same as the standard that it established for in-house counsel in *TRW, Inc.* The GAO must determine each attorney's eligibility for access on a case-by-case basis. It may not assume that an attorney's status as retained counsel is dispositive. In this case, the GAO determined that appropriate safeguards minimized the risk of inadvertent disclosure of the protected information.

Document Production Under the Revised Rules

After two rounds of document production, a protester asked the GAO to draw an adverse inference from the agency's failure to produce documents that the protester believed were in the agency's files.[225] The agency responded that it had produced every document that the protester had requested and stated that it would submit any additional documents it later might discover. The protester then accused the agency of withholding or destroying the documents.

The GAO declined to draw an adverse inference from the agency's failure to produce the requested documents. Finding no evidence that the documents ever existed, or that the agency had destroyed them, the GAO refused to rely solely on the protester's speculation that the agency improperly was withholding information.

Attorney Fee and Cost Awards Under the Revised Rules

In *Oklahoma Indian Corp.*,[226] the first costs and attorneys' fees case to be decided under the revised rules, the GAO refused to award a contractor costs and fees when it found that the agency had taken corrective action two weeks after the contractor filed the protest. The GAO explained that its purpose for revising the rule on costs and attorneys' fees was *not* to award costs or fees whenever an agency takes corrective action. The Comptroller General intends to award costs and fees only when an agency "unduly delay[s] taking corrective action in the face of a clearly meritorious protest." The GAO has followed the *Oklahoma Indian Corp.* rationale consistently in a number of different factual situations, but has yet to formulate a bright-line test for this issue.[227]

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[222] Comp. Gen. Dec. B-243450.2, Aug. 16, 1991, 91-2 CPD ¶ 160; *see also* Comp. Gen. Dec, B-243544, Aug. 7, 1991, 91-2 CPD ¶ 134.

[223] This test derives from the Federal Circuit's decision in *United States Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir. 1984); *see also* Matsushita Elec. Indus. Co. v. United States, 929 F.2d 1577, 1580 (Fed. Cir. 1991). The GAO has devised a series of questions to help determine the degree of risk of inadvertent disclosure. These questions include: (1) Is the attorney engaged in litigation matters or matters of production, marketing, or pricing?; (2) Is the attorney physically separated from corporate decision-makers?; (3) Is the area secure?; and (4) To what degree is the attorney supervised?

[224] Ms. Comp. Gen. B-242379.2, Nov. 27, 1991.

[225] Comp. Gen. Dec. B-243693, Aug. 19, 1991, 91-2 CPD ¶ 162. The revised rules expressly permit the GAO to draw an adverse inference if the agency fails to produce documents. *See* 56 Fed. Reg. 3759 (to be codified at 4 C.F.R. § 21.3(d)); *see also supra* note 209 and accompanying text.

[226] Comp. Gen. Dec. B-243785.2, June 10, 1991, 91-1 CPD ¶ 558.

[227] *See, e.g.*, Comp. Gen. Dec. B-244135.2, Oct. 7, 1991, 91-2 CPD ¶ 312 (no fees awarded when the agency took corrective action within three weeks after the filing of a protest); Comp. Gen. Dec. B-244290.2, Sept. 18, 1991, 91-2 CPD ¶ 260 (four weeks is not undue delay in taking corrective action); Comp. Gen. Dec. B-244384.2, Sept. 16, 1991, 91-2 CPD ¶ 251 (argument that protest was required to get corrective action rejected as basis for cost award); Comp. Gen Dec. B-243625.3, Aug. 30, 1991, 91-2 CPD ¶ 222 (protester was not entitled to recover fees when the agency took initial corrective action two weeks after the protest was filed).

In another cost and attorney fee decision,[228] the GAO denied recovery of costs and attorneys' fees that the protester apparently incurred on a contingent basis. Notably, the protester submitted its request for consultant costs to the GAO long after it allegedly had incurred the costs and after the GAO had decided that the protester was entitled to costs. Moreover, the attorney's records showed that the protester similarly had incurred a significant percentage of its legal fees after the protest was filed and, in several instances, after the GAO granted entitlement. The GAO denied recovery of contingent costs and of all costs the protester incurred after filing the protest.

Bidders May Not Vary Bid Extension Periods

The Navy was forced to postpone award of a construction contract. Accordingly, it requested a sixty-day extension of the bid acceptance period from the three lowest bidders. Two of the bidders granted the request, while the remaining bidder extended its bid in two week increments. On review, the GAO overruled prior decisions that had permitted bidders to extend bid acceptance periods for less than the time requested by federal agencies.[229] According to the GAO, "to permit a bidder to limit its risk of increased performance costs and thereafter [to] extend at its option while others face[d] that risk by complying in full with the request of the contracting officer" was unfair.

Termination and Resolicitation Not Justified

In *Rexon Technology Corp.*[230] an agency attempted to use a vague performance incentive provision to give ten percent evaluation preferences to offerors with good performance records. The agency attempted several times to apply the evaluation preference, but it arrived at a different awardee each time, depending on how it computed the preference. After awarding to Rexon Technology Corp. (Rexon), the agency decided that its preference evaluation had been flawed and terminated the contract. The agency's resolicitation omitted the performance incentive. It simply stated that the agency would award the contract to the lowest-priced, technically acceptable offeror. Rexon protested the termination. It argued that if the agency intended to award the new contract on the basis of low price, then it should not have terminated the original contract because, without computing the preference, Rexon had been the low offeror. Finding that the resolicitation had amounted to an auction because the agency had revealed the prices of the competitors, the GAO sustained the protest and recommended reinstatement of the original award.

Protester Prohibited from Objecting to Corrective Action

In a novel twist on the typical bid protest, Bay View Refuse Service, Inc. (Bay View) protested an agency's corrective action several years after contract award.[231] It complained that the agency wrongfully ordered Bay View's contract terminated for the convenience of the government after a third party challenged the agency's plan to exercise Bay View's option. Bay View argued that, after award, the agency was barred from taking corrective action to rectify an earlier error. The GAO denied the protest, ruling that an agency always may take corrective action, whenever it becomes aware of the need to do so.

GAO Strictly Construes Timeliness Rules

In *Aeroflex International, Inc.*,[232] the GAO told the contractor (Aeroflex) when the contractor had to submit its response to an agency administrative report. It advised Aeroflex to notify the GAO if it did not receive the agency report on time. Aeroflex received the agency report two days late. The GAO subsequently dismissed Aeroflex's protest because Aeroflex had failed to respond to the report within the time required under the GAO protest rules.[233] The GAO rejected Aeroflex's request for reconsideration, finding that the protester had had actual notice of the deadline for its response. The GAO strictly enforced the ten-day response rule, holding that the contractor should have notified the GAO and requested an extension when the agency submitted its report late.

Constructive Denial of Agency Protests

An agency's promise of corrective action may extend a contractor's deadline for filing a protest. In *Analytica, Inc.*,[234] the protester complained to the agency that a contract specialist had disclosed to the protester's competitor market survey information about the protester's prices. The agency assured the protester that, when it issued the RFP, it would use evaluation factors other than price, thereby mitigating the damage of the alleged price disclosure. The agency issued the RFP without the promised

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[228] Comp. Gen. Dec. B-239904.3, Aug. 16, 1991, 91-2 CPD ¶ 159.

[229] Ms. Comp. Gen. B-243390, Nov. 12, 1991; *see, e.g.*, Comp. Gen. Dec. B-189661, Feb. 3, 1978, 78-1 CPD ¶ 100.

[230] Comp. Gen. Dec. B-243446.2, Sept. 20, 1991, 91-2 CPD ¶ 262.

[231] Comp. Gen. Dec. B-241579.2, Apr. 16, 1991, 91-1 CPD ¶ 377.

[232] Comp. Gen. Dec. B-243603.3, Oct. 7, 1991, 91-2 CPD ¶ 311.

[233] 4 C.F.R. § 21.4(j) (1991).

[234] Comp. Gen. Dec. B-243692, July 31, 1991, 91-2 CPD ¶ 108.

language, but the protester did not object until it learned that the agency had awarded the contract to a competitor. On review, the GAO rejected the agency's position that the protester's discovery of the alleged price disclosure had amounted to initial adverse agency action. It ruled, however, that issuing the RFP without evaluation factors other than cost was an initial adverse agency action and a constructive denial of the agency protest. Noting that Analytica had waited more than ten days after the agency issued the RFP to file its protest, the GAO dismissed the protest as untimely.[235]

In *Sunbelt Industries, Inc.*[236] the GAO dismissed a protest as untimely when the contractor filed a protest ten days after it received a letter denying an agency-level protest. The GAO based this seemingly anomalous decision on language in the GAO's bid protest rules that requires protests to be filed within ten days of actual or constructive notice of the basis for the protest.[237] Significantly, five days after the filing of the agency protest, the contracting officer had proceeded with bid opening on the originally scheduled date. The GAO ruled that the contracting officer constructively had denied the agency protest by opening the bids without deciding the protested matter. Accordingly, the protester should have filed its protest within ten days of bid opening.

GAO Approves Agency Decision to Forego Competition

In *Otero County Electric Cooperative*,[238] after initially synopsizing a service requirement in the *Commerce Business Daily*, the Air Force instead decided to modify an existing requirements contract to obtain the services. A contractor that had planned to bid on the advertised solicitation protested, contending that the Air Force should have acquired the services competitively, as contemplated in the *CBD* notice. The GAO, however, found that the Air Force mission at the installation had changed and concluded that the agency's decision to obtain the services by modifying the existing contract was reasonable. It also remarked that the proposed change was within the scope of the existing contract, which authorized changes in quantities as the mission changed, and noted that the agency plans to award a comprehensive contract that includes the new requirement when the current requirements contract expires in 1993.

Base Closure Justifies Cancellation of Solicitation

Lake Region Office Supply, Inc., submitted the only offer in response to an RFP. The agency later cancelled the solicitation because it anticipated that it shortly would have to close the base for which it had identified the requirement. The contractor protested, seeking to force the agency to award it the contract. The GAO summarily dismissed the protest. Finding that the decision to close the base was a matter within the sole discretion of the agency, the GAO declared that compliance with base closure procedures was an internal agency matter, which it would not review.[239]

Disappointed Bidder Litigation in the Claims Court

Varying Standards to Demonstrate Standing and Entitlement for Injunctive Relief

Two decisions of the Claims Court in the past year discuss the plaintiff's burden of proof in disappointed bidder actions. In *Blackwell v. United States*[240] the court carefully distinguished between the standard for establishing standing and the standard for proving that the government has breached the implied-in-fact contract to evaluate an offer fairly and honestly. To establish standing, a bidder need show only that its bid was in the zone of active consideration and that it had had a substantial chance of receiving the award. Conversely, a protester seeking injunctive relief and the award of bid preparation costs bears the "heavy burden" of proving that the government did not evaluate its bid fairly and honestly. In the second decision—*Logicon Inc. v. United States*[241]—Judge Nettesheim, writing for the majority, strongly criticized other Claims Court judges and the government for asserting that the plaintiff in a disappointed bidder action must prove its case by "clear and convincing evidence." The majority held that a plaintiff seeking preliminary injunctive relief before award must prove only that it has a strong likelihood of success on the merits.

Preaward Jurisdiction in Transfer Cases Based upon the Original Filing Date

In *Blackwell v. United States*[242] a disappointed bidder filed a preaward action in federal district court. The dis-

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[235] *Id.*; *see also* Comp. Gen. Dec. B-245702, Sept. 23, 1991, 91-2 CPD ¶ 269 (agency constructively denied protest against amendment to solicitation by requesting best and final offers without amending solicitation).

[236] Comp. Gen. Dec. B-245780.2, Oct. 29, 1991, 91-2 CPD ¶ 399 (reconsideration).

[237] 4 C.F.R. § 21.2(a)(3) (1991).

[238] Comp. Gen. Dec. B-244353, Oct. 15, 1991, 91-2 CPD ¶ 332.

[239] Comp. Gen. Dec. B-243934, May 22, 1991, 91-1 CPD ¶ 502.

[240] 23 Cl. Ct. 746, 750 (1991).

[241] 22 Cl. Ct. 776, 783 (1991).

[242] 23 Cl. Ct. 746 (1991).

trict court transferred the case to the Claims Court. This transfer occurred after the agency awarded the contract. Citing *United States v. John C. Grimberg Co.*[243] the Government argued that the Claims Court lacked equitable jurisdiction because the case had been transferred to the Claims Court after award. The court rejected this argument, ruling that it would proceed as if the action had been filed in the Claims Court on the day it that it actually was filed in the district court. Accordingly, it concluded that, under the transfer statute,[244] the case was within the Claims Court's preaward equitable jurisdiction.

Claims Court Allows Recovery of Litigation Costs in Disappointed Bidder Case

The well-established rule expressed in the *Keco Industries*[245] cases provides that an unsuccessful bidder that brings an action in the Claims Court may recover only the costs of preparing its offer. Litigation costs are not included in the term "bid preparation costs."[246] In *Crux Computer Corp. v. United States*,[247] however, the court expressly refused to follow this general rule. The court held that litigation costs may be quantified with a high degree of accuracy and, therefore, are a reasonable measure of damages. In the instant case, however, the court found that the government actually had not breached its duty to evaluate the plaintiff's offer fairly. Accordingly, it declined to award plaintiff its costs.

Claims Court Disallows Cost of Preparing for Performance of Anticipated Contract

In *Celtech, Inc. v. United States*[248] a disappointed offeror sought to recover its bid preparation expenses. In its request, the contractor included costs that it had incurred while preparing to perform a contract that it had assumed it would receive. The court rejected this claim, holding that these costs are normally a part of the performance of the express contract between the government and a contractor, rather than part of the implied-in-fact contract between the government and bidders. Because the government had breached only the implied contract, the plaintiff could recover only those damages that related directly to the preparation of its offer.

Court Disallows Cost of Prototype Development in Disappointed Bidder Litigation

In *Coflexip & Services, Inc. v. United States*[249] the Claims Court held that bid preparation costs do not include the cost of developing and fabricating a prototype, unless the solicitation specifically sets forth the preparation of a prototype as a condition for receipt of award.

Disappointed Bidder Litigation in the Federal Courts

CICA Automatic Stay Requires Notice from the GAO

A contractor filed a protest with the GAO on the tenth calendar day after award—a Friday. The protester notified the agency of the protest on the same day, but the agency did not receive GAO's notification of the protest until the following Monday. Under these facts, the District Court for the District of Columbia held that the protester was not entitled to an automatic stay of contract performance under CICA.[250] The district court held that the automatic stay provision is ineffective unless the GAO notifies the agency of a protest within ten calendar days of award. According to the court, actual notice from the *protester* does not trigger CICA's automatic stay.

Eleventh Circuit Holds That District Courts Lack Jurisdiction Over Contract Disputes

In *Mark Dunning Industries, Inc. v. Cheney*[251] the District Court for the Middle District of Alabama held that the Army acted improperly when it followed the GAO's recommendation to terminate the plaintiff's contract and award it to Reliable Trash Service (Reliable). Pursuant to a settlement agreement with the plaintiff, the Army terminated Reliable's contract for convenience. Under the settlement, the Army agreed to resolicit the contract. Last year, however, the Eleventh Circuit held

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[243] 702 F.2d 1362 (Fed. Cir. 1983); *see also* 28 U.S.C. § 1491(a)(3) (1988).

[244] *See* 28 U.S.C. § 1631 (1988).

[245] *See* Keco Indust., Inc. v. United States, 192 Ct. Cl. 773 (1970) (*Keco I*); and Keco Indus., Inc. v. United States, 203 Ct. Cl. 566 (1974) (*Keco II*).

[246] As recently as 1989, the Claims Court refused to allow recovery of protest costs, including attorney fees, in a disappointed bidder action. *See, e.g.*, American Tel. & Tel. Technologies, Inc. v. United States, 18 Cl. Ct. 315 (1989).

[247] 24 Cl. Ct. 223 (1991).

[248] 24 Cl. Ct. 269 (1991).

[249] 23 Cl. Ct. 67 (1991).

[250] Bendix Field Eng'g Servs., Inc. v. United States, No. 91-2733 (D.D.C. Nov. 15, 1991); 56 Fed. Contr. Rep. (BNA) 737 (Nov. 25, 1991) (interpreting 31 U.S.C. § 3553(d)(1) (1988)).

[251] 726 F. Supp. 810 (M.D. Ala. 1989). For a full discussion of the past history of this case, see *1990 Contract Law Developments—The Year in Review*, The Army Lawyer, Feb. 1991, at 3, 36.

that the district court had lacked jurisdiction to entertain Reliable's complaint or to enjoin the resolicitation.[252] Moreover, the lower court had no legal authority to compel the government specifically to perform a contract. The Eleventh Circuit dismissed the case without prejudice to allow Reliable to bring an action in the Claims Court.

District Court Upholds ASBCA Ruling on CICA Stay of Performance Claim

In *Port Arthur Towing Co. v. Department of Defense*[253] the District Court for the District of Columbia held that an agency was not liable for the costs associated with a suspension of work that the agency had ordered pursuant to CICA automatic stay provisions.[254] The sovereign act doctrine bars claims against the government for actions that it takes in its sovereign capacity. A sovereign act possesses three characteristics: (1) the act must be of general applicability and public in nature; (2) the contracting agency must not be the motivating force behind the action; and (3) Congress must not have waived federal sovereign immunity expressly. The court held that the agency's compliance with the CICA stay provisions met this test and denied the contractor's claim for costs incurred during the stay.

Disappointed Bidder Litigation Before the General Services Board of Contract Appeals

Interested Parties and Intervenors

In *Symbiont, Inc.*,[255] the GSBCA held that an offeror that was neither a manufacturer, nor a regular dealer, as defined by the Walsh-Healey Public Contracts Act,[256] was not an interested party. Accordingly, the offeror could not protest the government's award in an automatic data processing equipment (ADPE) acquisition.

In *ViON Corp.*[257] a nonbidder on a solicitation protested an amendment to the solicitation, alleging that it intended to compete on the revised requirement. Without discussing the Federal Circuit decision in *MCI Telecommunications Corp. v. United States*,[258] the GSBCA held that the protester's alleged intent to compete invested the protester with interested-party status, enabling it to challenge the agency's decision to amend the solicitation instead of resoliciting the contract.

In *Analysas Corp.*[259] the GSBCA allowed the Small Business Administration (SBA) to intervene in a protest to ensure that the Board correctly interpreted the SBA's regulations. This decision is part of a growing trend toward allowing other interested federal agencies to participate in protests.

Selection of Forum

In *Southern CAD/CAM*[260] the contractor filed a protest with the GAO, which the GAO summarily dismissed. The contractor then protested the same acquisition to the GSBCA, this time raising different grounds for relief. The Board held that the protester's original decision to protest the acquisition before the GAO was an election of forum that barred the contractor from challenging the same acquisition before the GSBCA. The mere act of filing, however, does not constitute an election. In *Syscon Corp.*[261] the contractor telefaxed a protest to the GAO after business hours on a Friday to obtain an automatic stay. On the next business day, the protester withdrew its protest from the GAO and filed it with the GSBCA. The Board held that the contractor's election of the GSBCA was timely, was not precluded by the earlier filing at the GAO, and was not forum shopping.

Timeliness

As a general rule, the GSBCA strictly enforces the time limits for filing protests. In *ISG, Inc.*,[262] the contractor filed a protest by facsimile machine, but the transmission was not completed until after the deadline that had been set for receipt of initial proposals. The Board held that the protest was untimely.

Suspensions of Procurement Authority

The GSBCA has refused to suspend delegations of procurement authority (DPAs) in a number of recent protests, especially in cases involving acquisitions with congressional interest. In *Electronic Systems & Associates, Inc.*,[263] the Board concluded that the government's need for engineering services to support the "war on

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[252] 934 F.2d 266 (11th Cir. 1991).

[253] No. 90-1889 (D.D.C. July 9, 1991). This is an appeal from a board decision, styled *Port Arthur Towing Co.*, ASBCA No. 37,516, 90-2 BCA ¶ 22,857. The district court heard this appeal under its admiralty jurisdiction. *See* 41 U.S.C. ¶ 603 (1988); 28 U.S.C. ¶ 1333 (1988); Southwest Marine of San Francisco, Inc. v. United States, 896 F.2d 532 (Fed. Cir. 1990).

[254] 31 U.S.C. ¶ 3553(d) (1988).

[255] GSBCA No. 11,170-P, 91-2 BCA ¶ 23,960.

[256] *See* 41 U.S.C. ¶ 35 (1988).

[257] GSBCA No. 11,103-P, 91-2 BCA ¶ 23,841.

[258] 878 F.2d 362 (Fed. Cir. 1989) (holding that an offeror that had failed to submit a proposal before period ended lacked standing).

[259] GSBCA No. 10,990-P, 91-1 BCA ¶ 23,616.

[260] GSBCA No. 11,034-P, 91-2 BCA ¶ 23,735.

[261] GSBCA No. 10,890-P, 91-1 BCA ¶ 23,523.

[262] GSBCA No. 11,075-P, 91-2 BCA ¶ 23,790.

[263] GSBCA No. 11,291-P, 91-3 BCA ¶ 24,134.

drugs'' was urgent and compelling. The Board showed great deference to congressional expressions of urgency, relying heavily on the language of a committee report that addressed the drug war effort. In *Lockheed Integrated Solutions Co.*[264] the Board found urgent and compelling a requirement for a super computer at the National Cancer Institute. Remarking on the daily death toll from AIDS and cancer, the Board concluded that a single day's delay in developing new treatments could cause a significant loss of life. It also noted that Congress had appropriated $34 million specifically to acquire the super computer. In *ViON Corp.*[265] the GSBCA found the possibility that an energy crisis could result from the war in the Persian Gulf sufficient reason not to suspend a computer contract for the Strategic Petroleum Reserve.

If, before protest, the agency does not proceed with a degree of diligence that denotes an urgent situation, the agency is unlikely to avoid a suspension of its DPA. In *Integrated Systems Group, Inc.*,[266] the agency took six months to issue a *Commerce Business Daily* notice for a multiple award schedule acquisition. Agency witnesses blamed the delay on the contracting office. The GSBCA concluded that the acquisition was not urgent enough to justify withholding suspension of the agency's DPA during the protest period.

Scope of Review

Several recent cases indicate that the GSBCA may be moving away from its strict scrutiny of agency acquisitions. One trend is an emerging requirement that a protester must demonstrate harmful error before it may receive certain types of relief. We reported the first of these cases last year.[267] More recently, in *Corporate Jets, Inc.*,[268] an agency violated a federal regulation by amending a solicitation before informing the protester that it was excluded from the competitive range.[269] The Board, however, did not grant relief. It found that, although the agency's action was erroneous, it was not prejudicial because the protester properly was excluded from the competition. Similarly, in *TRW, Inc.*,[270] the agency violated a regulation by selecting an evaluator who was a close personal friend of several of the awardee's executives. The Board declined to grant relief because the evaluator had taken no action that was harmful to the protester.[271]

Alternative Disputes Resolution

In a recent Army protest[272] the parties agreed to submit a dispute to alternative disputes resolution. They permitted the GSBCA to render a one-judge, nonappealable decision on the merits. The Army prevailed in a motion for judgment—essentially, a directed verdict—at the completion of the protester's case.

Remedies Available at the GSBCA

In another landmark Federal Circuit decision, *SMS Data Products Group, Inc. v. Austin*,[273] the court held that the GSBCA lacked the authority to direct an agency to award a contract to a successful protester. The Board's only authority is to modify DPAs granted by the GSA. The decision, however, did not address what other actions the Board may take under the guise of amending DPAs. In past decisions the GSBCA has used its authority to modify DPAs as a form of injunctive relief.[274]

On the related issue of costs and fees, agencies frequently seek to reduce awards of attorneys' fees when a protester prevails on only one of several allegations. This approach failed in *Planning Research Corp.*,[275] however, when the Board observed drily that ''a home run that barely clears the fence counts as much as one that hits the upper deck'' and awarded the protester full recovery.

The Conyers Bill

Responding in part to certain Federal Circuit decisions relating to ADPE acquisition, Representative John Conyers of Michigan has proposed several amendments to the Brooks Act.[276] Title III of the Conyers Bill[277] would

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[264] GSBCA No. 11,349-P, 91-3 BCA ¶ 24,198.

[265] GSBCA No. 11,002-P, 91-1 BCA ¶ 23,615.

[266] GSBCA No. 11,496-P, ___ BCA ¶ ___, 1991 BPD ¶ 255.

[267] Andersen Consulting, GSBCA No. 10,833-P, 91-1 BCA ¶ 23,474.

[268] GSBCA No. 11,049-P, 91-2 BCA ¶ 23,998.

[269] *See* FAR 15.609(c).

[270] GSBCA No. 11,309-P, ___ BCA ¶ ___, 1991 BPD ¶ 205.

[271] *Id. See generally supra* notes 133-36, 161 and accompanying text.

[272] Centel Fed. Sys., Inc., GSBCA No. 11,326-P, 91-3 BCA ¶ 24,250.

[273] 940 F.2d 1514 (Fed. Cir. 1991).

[274] *National Capitol Sys., Inc.*, GSBCA No. 10,823-P, 91-1 BCA ¶ 23,525 (directing agency to disclose evaluation materials to all offerors in competitive range and request second round of BAFOs).

[275] GSBCA No. 10,905-C (10,694-P), 91-3 BCA ¶ 24,159.

[276] 40 U.S.C. § 759 (1988).

[277] H.R. 3161, 102d Cong., 1st Sess. (1991).

overturn several recent Federal Circuit decisions that limit the GSBCA's subject matter jurisdiction and remedial powers. The bill also would change the appellate authority in GSBCA bid protests from the United States Court of Appeals for the Federal Circuit to the United States Court of Appeals for the District of Columbia. This bill did not pass in the first session of the 102d Congress, but agencies should monitor the bill's status during the second session. If passed, it will affect federal acquisitions significantly.

Small Business and Other Socioeconomic Program Developments

Small Business Administration Developments

SBA Streamlines "Breakout" Appeal Process.

The SBA has issued a final amendment to its breakout procurement center representative (BPCR) regulations.[278] A BPCR's primary duty is to monitor acquisitions and to recommend the breakout of requirements for full and open competition. Under a previously proposed rule,[279] if a program manager rejected a breakout recommendation during planning stages, the BPCR could appeal to the head of the program, while reserving the right to appeal at the contracting stage. The rule that the SBA finally adopted similarly encourages early resolution of breakout issues by allowing a BPCR to appeal directly to the head of the agency. A decision by the agency head is final, however, and the BPCR may not appeal again during the contracting phase. A BPCR still may appeal during the contracting phase, but only if it did *not* appeal during the acquisition planning phase.

SBA Nonmanufacturer Rule Waivers

The SBA actively exercised its waiver authority in 1991. It determined that no small business manufacturers or processors exist in the federal market for a number of products, waiving the nonmanufacturer rule for mainframe computers and peripheral equipment;[280] computer disk drives and laser printers;[281] certain metal plates, sheets, and strips;[282] cranes weighing more than fifteen tons, small paper bags, and assorted subsistence items.[283] The SBA also terminated a waiver for hacksaw blades.[284]

Agency Policy and Regulatory Changes

1. DOD and OFPP Encourage Small Business Participation in Architect-Engineer Contracts: The Small Business Competitiveness Demonstration Program requires an agency to reestablish set-asides for a designated industry group (DIG) if the agency fails to award at least forty percent of its annual contract dollars to small firms competing in that DIG.[285] Upon review, the Defense Department determined that it had not met its goal for architect-engineer (A-E) contracts and reestablished the small business set-aside requirement for that DIG.[286]

To enhance contracting opportunities for "emerging small businesses" (ESBs) in the A-E DIG, the Office of Federal Procurement Policy raised the ESB reserve threshold for this industry from $25,000 to $50,000.[287] The Administrator of the OFPP adjusted the reserve amount because ESBs did not receive their statutory fifteen percent share of the dollar value of A-E contracts in 1990.[288] Accordingly, contracting officers now must consider all A-E acquisitions within the $50,000 range for exclusive ESB competition.

2. Changes to DFARS Part 219, Small Business and Small Disadvantaged Business Concerns: The DOD recently implemented the Mentor-Protege Program.[289] Under this small disadvantaged business (SDB) assistance program, qualifying defense contractors, known as mentor firms, provide management, technical, and financial assistance to SDBs—also known as protege firms. As an incentive, the Defense Department may reimburse a mentor firm directly for the assistance it provides a SDB or may allow credit toward the mentor's SDB sub-

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[278] *See* 13 C.F.R. pt. 125 (1991).

[279] 55 Fed. Reg. 19,633 (1990).

[280] 56 Fed. Reg. 42,524 (1991) (effective Aug. 28, 1991).

[281] 56 Fed. Reg. 37,648 (1991) (effective Aug. 8, 1991).

[282] 56 Fed. Reg. 41,787 (1991) (effective Aug. 23, 1991).

[283] 56 Fed. Reg. 49,841 (1991) (effective Oct. 2, 1991). The items include assorted canned products, including canned tuna, spinach, pineapple pieces, pineapple juice, and citrus sections. The waiver also applies to granulated and brown sugar.

[284] 56 Fed. Reg. 49,672 (1991) (effective Dec. 30, 1991).

[285] 15 U.S.C. § 644 note (1988). The designated industry groups are construction, refuse collection and disposal, architectural and engineering services, and nonnuclear ship repair.

[286] Memorandum, Director, Defense Procurement, Sept. 30, 1991, subject: Reestablishment of Small Business Set-Asides and Raising the Emerging Small Business Reserve Under the Small Business Competitiveness Demonstration Program; *see also* Acquisition Letter (AL) 91-10, HQ, Dep't of Army, Oct. 17, 1991, encl. 20.

[287] 56 Fed. Reg. 46,656 (1991) (effective Oct. 15, 1991). An emerging small business is a firm that is half the size of the size standard applicable to an acquisition. *Id.*

[288] *See* 15 U.S.C. § 644 note (1988).

[289] 56 Fed. Reg. 37,963 (1991) (adding DFARS subpt. 219.71 and DFARS 252.232-7009, effective Oct. 1, 1991); *see also* 56 Fed. Reg. 37,958 (1991) (DOD program policy).

contracting goals. To be eligible, a business must be performing a contract that has a negotiated subcontracting plan; must provide an acceptable program concept; and must have a satisfactory history of subcontracting with SDBs.

The DFARS streamlined its order of precedence for set-asides by deleting combined small business and labor surplus area (LSA) set-asides, partial LSA set-asides, and partial regular small business set-asides. As revised, the order of precedence is: (1) total SDB set-aside; (2) total regular small business set-aside; and (2) partial regular small business set-aside with an SDB preference.[290]

The FAR allows the government to assess liquidated damages against a contractor that willfully or intentionally fails to meet its small business or SDB subcontracting goals.[291] In 1991, the Defense Acquisition Regulatory (DAR) Council removed a similar DFARS provision that had authorized DOD agencies to impose liquidated damages on contractors that failed to meet goals negotiated under comprehensive subcontracting plans. The DFARS now also forbids agencies to incorporate the FAR liquidated damages clause into contracts for which the contracting officer has approved the use of comprehensive subcontracting plans.[292]

3. DOD Deletes Labor Surplus Area Provisions: As rewritten, the DFARS finalizes a DAR Council proposal to remove DFARS part 220, which governs labor surplus area concerns.[293] The DAR Council took this action because part 220 duplicated coverage in the FAR. Moreover, the need to employ special measures to award to contractors in labor surplus areas has diminished as the number of LSAs increased.[294]

Review of 8(a) Acquisitions[295]

1. GAO Reviews Protest of Competitive 8(a) Acquisition: In *Morrison Construction Services, Inc.*,[296] the GAO asserted jurisdiction over a protest arising under a competitive 8(a) acquisition. Traditionally, the GAO has refused to review 8(a) awards absent a showing of fraud, bad faith, or a violation of regulations. The GAO declined jurisdiction in earlier cases because it found that 8(a) acquisitions were not subject to statutory competition requirements and that contracting officers had broad discretion to contract through the SBA with a single eligible source. Current law and regulations, however, limit a contracting officer's discretion and agencies now must compete 8(a) contracts that they expect will exceed certain dollar thresholds.[297] Accordingly, the GAO now will review these actions to ensure the integrity of the 8(a) competitive process.

2. GSBCA Reviews Decision to Withdraw Acquisition Reserved for 8(a) Contractor: In *Symbiont, Inc.*,[298] the GSBCA considered a protest in which the protester alleged that an agency improperly withdrew an in-house work requirement from its 8(a) program. It found that, although an agency has wide latitude to let 8(a) contracts on terms agreeable to the agency and the SBA, this discretion is not absolute. Therefore, the Board concluded that it could review Symbiont's protest to determine whether the agency had a reasonable basis for withdrawing the requirement. The GAO, on the other hand, dismissed a similar protest on the ground that award to the SBA is *solely* within the discretion of the contracting agency.[299]

3. Demand by SBA's 8(a) Contracting Officer for Recoupment of Advance Payments Was Proper: As a general rule, the SBA delegates 8(a) contract administration authority to the requiring activity—as it did in *Do-Well Machine Shop, Inc.*[300] In that case, however, the SBA had reserved the right to control all advance payment transactions by deliberately modifying its subcontract with Do-Well Machine Shop (Do-Well). Following the default termination of the Do-Well subcontract, the SBA issued a final decision, seeking repayment of unliquidated advances. Arguing before the ASBCA, Do-Well claimed that the Board lacked jurisdiction because the SBA final decision was invalid. It con-

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[290] 56 Fed. Reg. 36,356 (1991) (amending DFARS 219.504, effective Dec. 31, 1991).

[291] *See* FAR 52.219-9.

[292] DAC 88-18, 56 Fed. Reg. 15,162 (amending DFARS 219.702(a) and 219.708(b)(2) and deleting DFARS 252.219-7016, effective Mar. 4, 1991). This change implements § 402 of the Small Business Administration Reauthorization and Amendments Act, Pub. L. No. 101-574, 104 Stat. 2814, 2832 (1990) (codified at 15 U.S.C. § 637 note).

[293] 56 Fed. Reg. 36,281 (1991) (effective Dec. 31, 1991).

[294] *See* 55 Fed. Reg. 10,637 (1990) (background comment to proposed rule).

[295] The term "8(a) acquisitions" refers to acquisitions made pursuant to section 8(a) of the Small Business Act of 1958. *See generally* 15 U.S.C. § 637(a) (1988). Section 8(a) authorizes the SBA "to enter into contracts with ... [federal agencies] to furnish articles, equipment, supplies or materials to the Government" and to "arrange for the performance of such contracts by negotiating or otherwise letting subcontracts to small businesses ...." *Id.*

[296] 70 Comp. Gen. 139 (1990).

[297] 15 U.S.C. § 637(a)(1)(D)(i) (1988); 13 C.F.R. § 311 (1991); FAR 19.805. Generally, the thresholds are $5 million for manufacturing contracts and $3 million for all other contracts.

[298] GSBCA No. 11,123-P, 91-2 CPD ¶ 23,876.

[299] *See* Comp. Gen. Dec. B-233844, Mar. 15, 1989, 89-1 CPD ¶ 275 (no contractor has right to have government satisfy requirement through this program).

[300] ASBCA No. 40,894, 91-3 BCA ¶ 24,358.

tended that, under the terms of the prime contract, the contracting agency—not the SBA—should have issued the decision. The Board declined to dismiss the appeal. Finding that Do-Well was bound by the terms of the modification that authorized the SBA to administer advance payments, it concluded that the SBA could initiate actions against Do-Well to withhold or recoup these funds.

Small Disadvantaged Business Cases

1. Evaluation Preference Does Not Apply to Line Items Funded by Civilian Agencies: In certain DOD acquisitions, SDBs may claim a ten percent evaluation preference over non-SDBs.[301] In *Commercial Energies, Inc.*,[302] the Defense Logistics Agency (DLA) conducted a partial set-aside for natural gas. The DLA RFP, which set forth requirements for both DOD installations and civilian agencies, provided that the SDB preference would apply only to supplies destined for Defense Department activities. Commercial Energies, Inc. (CEI) protested that the DFARS required DOD agencies to apply the preference to *all* the line items upon which award would be based. The GAO denied the protest, finding that the preference applies exclusively to line items funded with Defense Department appropriations. It concluded that, as a matter of law, only the Defense Department may expend funds for SDB preferences.[303]

2. DFARS SDB Preference Evaluation Scheme Passes Muster: In *Commercial Energies, Inc. v. United States*[304] the Court of Appeals for the Federal Circuit sanctioned the DOD practice of applying a ten-percent evaluation preference only to line items that form the basis of award. Contrary to CEI's contentions, the court concluded that the Defense Department reasonably could dispense with this preference when acquiring items, the cost of which an offeror could not control.[305]

Set-Aside Procedures

1. Agency Not Required to Set Aside Reprocurement of Defaulted Contract: In *Premier Petro-Chemical, Inc.*,[306] an agency issued an unrestricted solicitation to acquire diesel fuel that a defaulted contractor had failed to provide. Another contractor protested the solicitation, arguing that the DFARS mandates a total SDB set-aside when—as in the instant case—the contracting officer may expect at least two SDB offers that would not exceed the fair market price by more than ten percent.[307] The GAO found the contractor's reliance on the DFARS misplaced. It noted that the acquisition statutes and regulations do not apply to reprocurement actions. It also found that the contracting officer's unrestricted solicitation was proper because the contract's default clause allowed the activity to use any appropriate method of acquisition for reprocurements.

2. Set-Aside Proper When Only One Small Manufacturer of System's Major Component Exists: Before setting aside an acquisition for small businesses, a contracting officer must expect to receive offers from at least two small businesses that offer the products of different small businesses.[308] In *The Racal Corp.*[309] the agency set aside an acquisition for a hydrographic survey system. The protester argued that the set-aside decision was erroneous because only one small business manufactured the major component of the system and, therefore, the competitors could provide only the product of one small business. The GAO denied the protest, finding that the "product" the agency required was an integrated system, not a single component of the system—however important that component might be.

3. SBA Representative Agrees with Contracting Officer on Set-Aside, but GAO Is Not Persuaded: In *Neal R. Gross & Co., Inc.*,[310] the GAO overturned a contracting officer's decision to issue an unrestricted solicitation for court reporting services, even though the SBA procurement center representative had acknowledged that he would not have recommended a set-aside. The GAO generally accords SBA recommendations great deference. Here, however, the contracting officer's determination lacked a rational basis. The GAO noted with concern that the contracting officer had failed to perform a market survey and had relied mainly on her own determination that

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[301] DFARS 219.7002. The preference generally applies only to unrestricted or partial set-aside acquisitions.

[302] Comp. Gen. Dec. B-243402, July 30, 1991, 91-2 CPD ¶ 102.

[303] National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 1207, 100 Stat. 3816, 3973-75 (1986).

[304] 929 F.2d 682 (Fed. Cir. 1991), *aff'g* 20 Cl. Ct. 140 (1990).

[305] *Id.* In the instant case, the court permitted the DOD to decline to apply the preference to the acquisition of natural gas, for which index prices were established by market forces that were entirely outside the contractor's control. *Id.*

[306] Comp. Gen. Dec. B-244324, Aug. 27, 1991, 91-2 CPD ¶ 205.

[307] *See* DFARS 219.502-2-70.

[308] *See* FAR 19.502-2(a).

[309] Comp. Gen. Dec. B-242133, Apr. 2, 1991, 91-1 CPD ¶ 339.

[310] Comp. Gen. Dec. B-240924.2, Jan. 17, 1991, 91-1 CPD ¶ 53.

no two small businesses could meet the contract's quality or quantity requirements.

4. Attainment of Small Business Goal Did Not Justify Unrestricted Acquisition: An agency must initiate a total small business set-aside if it determines that: (1) a set-aside would help to "assur[e] that a fair proportion of Government contracts in each industry category ... is placed with small business concerns"; and (2) the "rule of two" is satisfied.[311] In *Library Systems & Services*[312] the agency declined to set aside an acquisition because it found that it had exceeded its small business goals. The GAO, however, ruled that the FAR provision upon which the agency relied contemplates attainment of contracting goals government-wide. The agency did not determine that the entire federal government had achieved its set-aside goals; therefore, its waiver of the "rule of two" was improper.

The Certificate of Competency Process

1. GAO and GSBCA Review Small Business Nonresponsibility Determinations: The SBA has conclusive authority to issue a certificate of competency (COC). Accordingly, the GAO normally will not consider complaints alleging that the SBA's refusal to certify a contractor was improper. Following this rule in one 1991 case, the GAO dismissed a protest filed by Pittman Mechanical Contractors (Pittman). Upon reconsideration, however, the GAO found that the SBA had refused to issue a COC to Pittman—not because Pittman was nonresponsible, but because it did not qualify as a small business under the acquisition. By making this determination, the SBA effectively relinquished its conclusive authority; therefore, the GAO could review the agency's nonresponsibility determination.[313]

Like the GAO, the GSBCA normally defers to the SBA when the SBA independently reviews an offeror's responsibility. In *Universal Automation Leasing Corp.*,[314] however, the Board refused to abide by this general rule. In a negotiated 8(a) acquisition, the contracting officer had found the protester nonresponsible and had proposed to eliminate it from the competitive range. The contracting officer forwarded his determination to the SBA, which failed to respond within the required fifteen days. The contracting officer then eliminated the protester without discussion. In this case, the GSBCA felt no compulsion to accord any weight to the SBA's tacit approval of the agency's nonresponsibility determination. The Board ultimately held that the nonresponsibility determination had been premature because the contracting officer did not hold discussions with the protester.

2. Claims Court Finds COC Process Applicable to 8(a) Acquisitions: In *Celtech, Inc. v. United States*[315] the court rejected the Government's contention that, in noncompetitive 8(a) acquisitions, contracting officers need not forward their findings of nonresponsibility to the SBA. The court found that the true purpose of the COC process is to accord procurement assistance to all eligible small business concerns. The court also dismissed the Government's assertion that the COC program does not apply to noncompetitive acquisitions. It reasoned that, if the SBA regularly follows the COC process to certify that 8(a) contractors are eligible to perform noncompetitive supply contracts,[316] the process should apply to noncompetitive acquisitions as well.

Labor Standards Developments

Changes to DFARS Part 222, Application of Labor Laws to Government Acquisitions

New Davis-Bacon Guidance

The DAR Council recently incorporated a new subsection into the DFARS construction labor standards provisions.[317] The regulation now requires agencies to apply Davis-Bacon Act[318] standards to construction performed under installation support contracts if the dollar value of all construction work on the contract is expected to exceed $2000. This subsection also provides a "bright-line" test for determining which labor standard applies when an agency is unsure whether work under a support contract should be classed as repairs, which are governed by the Davis-Bacon Act, or as maintenance, which is

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[311] FAR 19.502-1. The "rule of two" instructs an agency to reserve an acquisition for small business competition if it expects to receive at least two offers from responsible small businesses and if it will award at a fair market price. *See* FAR 19.502-2(a).

[312] Comp. Gen. Dec. B-244432, Oct. 16, 1991, 91-2 CPD ¶ 227.

[313] Comp. Gen. Dec. B-242242.2, May 31, 1991, 91-1 CPD ¶ 525. In deciding this case, the GAO also held that the time period within which a protest must be filed does not begin to run until the SBA acts on a contractor's timely appeal of the COC denial. *See id.*

[314] GSBCA No. 11,268-P, 91-3 BCA ¶ 24,255. This case involved an 8(a) acquisition to which the usual COC process did not apply. In acquisitions of this nature, the contracting officer should refer questions about the participant's responsibility to the SBA for consideration during the SBA's normal preaward responsibility determination. *See* 13 C.F.R. § 124.313(a) (1991); FAR 19.809.

[315] 24 Cl. Ct. 269 (1991).

[316] The SBA resolves questions concerning the eligibility of a small business to perform a supply contract that is estimated to exceed $10,000. *See* FAR 22.608-2; *cf.* Walsh-Healey Public Contracts Act, 41 U.S.C. § 35 (1988) (contractor must be manufacturer or regular dealer to be eligible for award).

[317] 56 Fed. Reg. 36,361 (1991) (adding DFARS 222.402-70, effective Dec. 31, 1991).

[318] 40 U.S.C. §§ 276a to 276a-6 (1988).

governed by the Service Contract Act.[319] If an individual service order requires thirty-two or more work-hours for services other than painting, an activity must classify the work as Davis-Bacon repair. For painting, the Davis-Bacon Act applies if the contractor paints 200 square feet or more, regardless of the number of work-hours required to complete the job.

Contract Work Hours and Safety Standards Act[320] Provisions

In DFARS subpart 222.3, contracting officers now may find specific guidance concerning assessment of liquidated damages under the Contract Work Hours and Safety Standards Act. This new rule prescribes fund withholding and contractor notification procedures. It also indicates when an assessment of liquidated damages becomes a final administrative determination and delineates the proper disposition of withheld funds.[321]

Judicial Review of Labor Standards Issues

Defective Specification Claim Did Not Bring Labor Dispute Within Jurisdiction of Board

In *Emerald Maintenance, Inc. v. United States*[322] the Army awarded a roofing contract that incorporated a Davis-Bacon Act wage determination. This wage determination prescribed separate pay scales for roofers and laborers. The contractor paid its laborers and roofers accordingly, unaware that a local practice required employers to pay the higher "roofer" rate to *all* persons that work on roofs. When the contractor later refused to pay restitution to its employees, the contracting officer withheld an appropriate sum and later denied the contractor's claim for the amount withheld. In its appeal to the ASBCA, the contractor failed to persuade the Board that the case actually involved defective specification and government misrepresentation issues, rather than labor issues. The Court of Appeals for the Federal Circuit affirmed the Board's decision. It held that, however the contractor might *want* to frame the issue, the parties actually were disputing a wage determination, which was a matter within the province of the Department of Labor (DOL). The court also affirmed the Board's ruling that reformation for mutual mistake was not warranted because the contractor had failed in its duty to familiarize itself with local labor practices.

Appeals Court Invalidates Davis-Bacon Delivery Driver Provision

Department of Labor regulations provide that transportation of supplies and materials to and from a construction site by contractor or subcontractor employees is work subject to the Davis-Bacon Act.[323] Last year, however, the Court of Appeals for the District of Columbia found that the unambiguous language of the statute establishes a spatial setting within which an employee must work before the Davis-Bacon Act applies.[324] The court found the DOL provision invalid because delivery drivers do not perform a significant amount of work "directly upon the site of the work" as the Act requires.[325]

Board of Contract Appeals Cases

Department of Labor Maintains Jurisdiction Over Labor Dispute Despite Delayed Resolution

Labor standards disputes are not subject to disputes clauses in contracts. Accordingly, boards and courts must dismiss appeals that derive solely from disputes clauses. In *Western States Management Services, Inc.*,[326] the DOL cited a contractor for labor violations and directed the government to withhold contract funds. The contractor eventually appealed to the ASBCA, complaining that the DOL had let twenty-two months pass without resolving the case. The Board, however, dismissed the appeal. It gave short shrift to the contractor's assertion that the ASBCA should assume jurisdiction over the dispute because of DOL's apparent inaction. In a brief dissent, one judge opined that the Board should entertain the appeal if DOL promptly did not act against the contractor or order the government to release withheld funds.

Board Grants Partial Relief on Claim Arising From Corrected Wage Determination

In *Sterling Services, Inc.*,[327] the government requested a wage rate determination from the DOL for a distribution service contract. The rate issued for several employ-

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[319] *See generally* 41 U.S.C. §§ 351-357 (1988).

[320] 40 U.S.C. §§ 327-332 (1988).

[321] 56 Fed. Reg. 36,360 (1991) (adding DFARS subpt. 222.3, effective Dec. 31, 1991).

[322] 925 F.2d 1425 (Fed. Cir. 1991), *aff'g* ASBCA No. 36,628, 88-3 BCA ¶ 21,103.

[323] 29 C.F.R. § 5.2(j) (1991).

[324] *See* Building and Constr. Trades Dep't, AFL-CIO v. Department of Labor, 932 F.2d 985 (D.C. Cir. 1991), *rev'g* 747 F. Supp. 26 (D.D.C. 1990).

[325] *Id.*; *see also* 40 U.S.C. § 276a (1988).

[326] ASBCA No. 42,627, 91-3 BCA ¶ 24,163.

[327] ASBCA No. 40,475, 91-2 BCA ¶ 23,714.

ees was too low because the contracting officer misclassified their positions. The DOL corrected this error during the first option year and ordered the contractor to adjust its employees' salaries retroactive to the contract execution date. The contracting officer denied the contractor's claim for all increased costs. On appeal, the Board denied the contractor recovery of its base-year costs, holding that the contractor had owed a duty to ensure that its employees were classified and paid properly. Conversely, the Board did allow an adjustment for increased option-year costs because the contract specifically authorized a price increase if the DOL issued a higher wage rate for an option period.

General Accounting Office Decisions

GAO Rejects Contention That Awardee Did Not Intend to Pay Proper Wages

The solicitation for housing maintenance in *Emerald Maintenance, Inc.*[328] contained both Service Contract Act and Davis-Bacon Act wage rates. After award, a disappointed bidder claimed that the awardee had indicated in its proposal that it did not intend to pay certain construction workers at Davis-Bacon Act rates. Consequently, the bidder argued that the government's cost realism analysis was defective. The GAO, however, found that the protester had misinterpreted the information it had obtained about the awardee's proposal. The prices on which the protester had focused were those that the awardee had proposed for maintenance work under the Service Contract Act, which mandates a lower wage rate than does the Davis-Bacon Act. The GAO also found that the awardee's proposal was not deficient for failing to list Davis-Bacon Act rates for construction workers. It concluded that, unless the awardee actually indicated an intent not to comply with a wage rate, the government could accept its proposal because the awardee was bound by the contract to adhere to all labor standards.

GAO Approves Use of SCA Wage Rates to Perform Cost Realism Review

T&M Joint Venture[329] involved a contract for systems engineering services subject to the Service Contract Act. The wage determination in the RFP excluded computer programmers and analysts from its coverage if they performed professional, executive, or administrative functions. For these employees, the protester proposed costs based on salaries below the Service Contract Act rates. The agency, however, used Service Contract Act rates to evaluate proposals for cost realism. As a result, it ultimately rated the protester's "real" costs higher than the awardee's. The protester objected that the agency's application of Service Contract Act rates had overstated its proposed costs significantly. The GAO, however, declared that the agency's use of the rates during the review was merely a matter of judgment, not a determination that the rates would apply during performance. Moreover, the GAO was not convinced that the bulk of these employees' duties actually would entail the exercise of discretion and independent judgment that the protester had claimed. Accordingly, it upheld as proper the agency's use of Service Contract Act rates to determine whether the protester's projected costs were realistic.

Foreign Acquisition Issues

Regulatory Changes

FAR Part 25, Nonavailability Determinations

Under a recent change to the FAR, contracting officers may determine that materials, articles, and supplies are not available in sufficient commercial quantities and, therefore, may exempt them from the domestic preference provisions of the Buy American Act.[330] A contracting officer may exercise this authority only if he or she seeks full and open competition, completes a proper synopsis of the acquisition, and does not receive a domestic offer. Agency regulations may limit the contracting officer's authority further.[331]

Miscellaneous FAR Changes

Federal Acquisition Circular 90-4[332] finalized several interim rules[333] involving Trade Agreements Act[334] acquisitions. The FAR now requires defense agencies to synopsize acquisitions that will be awarded and performed outside the United States, its possessions, and Puerto Rico, whenever the Act applies.[335] Moreover, a contracting officer must notify an offeror from any country to which the President has extended favorable trade status under the Trade Agreements Act[336] if its offer is

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[328] Comp. Gen. Dec. B-242331, Mar. 22, 1991, 91-1 CPD ¶ 320.

[329] Comp. Gen. Dec. B-240747, Dec. 19, 1990, 90-2 CPD ¶ 503.

[330] *See generally* Buy American Act §§ 2-3, 41 U.S.C. §§ 10a to 10c (1988).

[331] FAC 90-7, 56 Fed. Reg. 41,736 (1991) (amending FAR 25.102(b), effective Sept. 23, 1991).

[332] 56 Fed. Reg. 15,142 (1991) (effective May 15, 1991).

[333] 53 Fed. Reg. 27,460 (1988).

[334] *See generally* Trade Agreements Act of 1979 §§ 301-308, 19 U.S.C. §§ 2511-2518 (1988).

[335] FAR 5.202(a)(12).

[336] *See* 19 U.S.C. § 2511 (1988) (authorizing the President to "waive ... the application of any law ... regarding Government procurement that would ... result in treatment less favorable than that accorded ... [to United States] suppliers").

not accepted.[337] Finally, as amended, the FAR requires contracting officers to indicate in the contract schedule which line items are exempt from the Trade Agreements Act.[338]

DFARS Defines "U.S. Made End Product" For Trade Agreements Act Acquisitions

The DAR Council added a definition of "U.S. made end products" to the DFARS clause that governs Trade Agreements Act acquisitions. In acquisitions subject to the Trade Agreements Act, contractors may offer products that are comprised of over fifty percent foreign components—that is, products that are "nondomestic" as contemplated in the Act[339]—if those products were wholly manufactured or substantially transformed in the United States.[340] Defense agency contracting officers still must add a fifty percent evaluation differential to offers of American-made end products if an offer of a domestic product is otherwise low. The DFARS provides that American-made end products assembled from foreign components are not "domestic" products for purposes of the Buy American Act. Furthermore, current Defense Department policy asserts that the Trade Agreements Act does not waive the Buy American Act.[341]

Challenges to Domestic Content

GSBCA Reviews Protest That Alleges Awardee Will Not Provide Domestic Product

The GAO will dismiss allegations that an awardee's product is not domestic if the agency properly relied on the awardee's domestic Buy American Act certification. The GAO opines that, under these circumstances, whether an awardee actually provides a domestic item is purely a matter of contract administration, over which it has no jurisdiction.[342] Conversely, in *Rocky Mountain Trading Co.*,[343] the GSBCA rejected this rule, declaring that it has jurisdiction to review all timely challenges to an agency's Buy American Act evaluation. The Board noted that certain regulations govern the evaluation and selection of offers in Buy American Act acquisitions. The Board's statutory charter requires it to ensure compliance with these provisions, however reasonable the contracting officer's reliance on the Buy American Act certification might have been.

GAO Applies Buy American Act "Domestic End Item" Test To Two Ricoh Products and Reaches Different Results

In *General Kinetics, Inc.*,[344] the agency contracted for two different secure facsimile systems, a TEMPEST version and a non-TEMPEST version. After the agency awarded the contract to another company (Ricoh), General Kinetics protested that the agency's Buy American Act evaluation was erroneous and that Ricoh's machines actually were foreign products.

The GAO sustained the protest only in part. It found that the TEMPEST system's Japanese components, including the fax machine that comprised the heart of the system, were American-made within the meaning of the Act because Ricoh had modified them sufficiently in the United States to deprive them of their original Japanese identity. The GAO also remarked that the domestic cost of the system exceeded fifty percent of the system's overall cost, noting that the remanufactured fax machine alone represented more than half of the cost of the entire system.

Curiously, the GAO dismissed Ricoh's claims that the non-TEMPEST system was also domestic. It pointed out that more than fifty percent of the system's components were made outside the United States and ruled that the major component of the non-TEMPEST system—the Japanese fax machine—was not domestic because the limited modifications that Ricoh made to this component in the United States did not change its essential nature. Accordingly, it found that the agency should have increased Ricoh's proposed cost for the non-TEMPEST system by fifty percent when it evaluated this line item.

Contract Administration and Buy American Act Issues

Request for Buy American Act Waiver Insufficient

In *C. Sanchez and Son, Inc. v. United States*[345] the contractor submitted its bid for a construction contract

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[337] FAR 14.408-1(a)(2); FAR 15.1001(c)(2).

[338] FAR 25.407(c).

[339] *See* 41 U.S.C. § 10a (1988).

[340] DAC 88-17, 56 Fed. Reg. 9086 (1991) (amending DFARS 252.225-7006, effective Jan. 28, 1991). In the past, contractors that offered American-made products comprised of over 50% foreign components were not eligible to compete for contracts subject to the Trade Agreement Act. *See, e.g.*, International Business Mach. Corp., GSBCA No. 10,532-P, 90-2 BCA ¶ 22,824.

[341] *See* DFARS 225.402 (a)(1)(i); DFARS 225.105-70. Unlike the Defense Department, the GSA has concluded that if the Trade Agreements Act applies, the contracting officer shall not apply a Buy American Act differential to American-made products because the Trade Agreement Act waives the domestic preference provisions of the Buy American Act. *See* General Serv. Admin. Acquisition Reg. 525.402(a) (DATE).

[342] *See* Comp. Gen. Dec. B-240173, Oct. 16, 1990, 90-2 CPD ¶ 299.

[343] GSBCA No. 10,894-P, 91-1 BCA ¶ 23,619.

[344] Comp. Gen. Dec. B-242052.2, May 7, 1991, 91-1 CPD ¶ 445.

[345] 24 Cl. Ct. 14 (1991).

using a quote for foreign electrical cable. The agency refused to approve use of the foreign material, but agreed to accept a more expensive domestic brand proposed by the contractor. The agency later denied the contractor's claim for the difference in price between the two brands of material. The contractor appealed, arguing that the agency should have granted it a waiver of the Buy American Act provision applicable to this material.[346] It asserted that the domestic material cost had exceeded the cost of the foreign wire by more than six percent and that the domestic wire had been unavailable in sufficient commercial quantities to satisfy the requirements of the contract. Unimpressed by these arguments, the court held that nothing in the contractor's discussions or correspondence with the agency reasonably would have led the agency to believe that the contractor desired a Buy American Act waiver. Simply to inform the agency that the domestic wire was more expensive and that its subcontractor did not have an adequate supply to complete the contract timely was not sufficient.

Assembly in Mexico Transformed Domestic Components into Foreign Product

In *Valentec Wells, Inc.*,[347] the government awarded a contract for the production of ammunition cartridge links. During performance, Valentec Wells, Inc. (Valentec) produced metal loops made of domestic material in California and shipped them to Mexico, where employees joined the loops to form cartridge links. When it discovered this, the agency warned Valentec that it was violating the Buy American Act by manufacturing the end product outside the United States. Valentec moved its plant to California and later claimed relocation expenses and labor cost increases. The agency denied these claims. On appeal, the Board also held that the contractor was not entitled to an equitable adjustment. Noting that the contractor originally had intended to fashion the loops into their final form in Mexico, it concluded that Valentec had violated the Act by manufacturing the cartridge links outside the United States and was not entitled to reimbursement for correcting its violation of the law.

Contract Performance

Contract Interpretation

Disposal Requirement Did Not Include Waste Generated by Units Outside Activity Named in Contract

In *United States Eagle, Inc.*,[348] the Navy awarded a refuse disposal contract with a fixed-price requirement for disposal of infectious waste generated by one of its hospitals. During performance, the parties discovered that other Navy clinics were dumping waste at the hospital, and had done so during the previous contract with United States Eagle, Inc. (U.S. Eagle). The agency denied U.S. Eagle's claim for the estimated cost of handling the additional waste. On appeal, the Government argued that the contract terms—"at the Naval Hospital" and "generated by the Naval Hospital"—included waste generated by clinics subordinate to the hospital. The ASBCA rejected the Government's interpretation. Noting that the contract did not list subordinate organizations, it dismissed as implausible the assertion that the parties had intended that U.S. Eagle would service any organization deemed subordinate to the Navy hospital. The Board also found that the parties could not have contemplated disposal of waste from other clinics because both parties then were unaware that other clinics were dumping their waste at the hospital.

Government Interpretation Akin to "Riding a Bicycle Backwards Up a Hill"

The government contracted for the construction of a juvenile fish facility. This facility included a small control building. During performance, a dispute arose over the installation of heating, ventilating, and air conditioning (HVAC) in the building. The agency argued that the drawings and specifications evinced an HVAC requirement. The drawings depicted a hole for HVAC and did not indicate specifically—as they did for other appliances—that HVAC was excluded from the contract. The plans also required the contractor to install wiring and circuit breakers for the HVAC. The contractor contended that the contract did not require HVAC explicitly. It filed a claim, which the agency denied. On appeal, the Army Corps of Engineers Board of Contract Appeals (ENG BCA) found the government's interpretation unreasonable.[349] Nothing in the contract required HVAC and the Board declined to construe a requirement to prepare the *site* for HVAC installation as a requirement to provide the system itself. Similarly, the Board rejected the notion that the government could read the requirement into the contract as a "manifestly necessary" omission.[350]

Government Had Duty to Seek Clarification of Concessionaire Offer

In *Sanders International Ventures, Ltd.*[351] the government awarded a concession contract for its World Expo

[346] *See* 41 U.S.C. § 10b (1988); FAR subpt. 25.2; DFARS subpt. 225.2. Contractors shall use only domestic construction materials on federal works, unless the head of a department or his delegee waives the requirement. 41 U.S.C. § 10b (1988). Postaward waivers are obtainable. *See* John C. Grimberg Co. v. United States, 869 F.2d 1475 (Fed. Cir. 1989).

[347] ASBCA No. 41,659, 91-3 BCA ¶ 24,168.

[348] ASBCA No. 41,093, 91-3 BCA ¶ 24,371.

[349] Mann Constr. Co., ENG BCA No. 5740 (Feb. 1, 1991) (unpub.).

[350] *See* DFARS 252.236-7001 (governing contract drawings, maps, and specifications).

[351] ASBCA No. 38,504, 91-3 BCA ¶ 24,295.

88 pavilion. The contract required the vendor to pay a $271,600 rental fee and to provide at least $50,000 in catering services to an activity at the pavilion. On the bid schedule, the vendor wrote that it would pay the $321,600. It also agreed to pay five cents ($.05) for each attendee over the nine million mark. Finally, the contract expressly provided, "ALL MONIES PAID OVER $271,600 IN THE FORM OF NON-COMPETITIVE-TO-RESTAURANT-FOOD CREDITS NOT USED WILL BE PAID IN CASH AT RATE OF 30% ON DOLLAR."

A dispute arose when the agency attempted to collect five cents for each attendee over the nine million mark. The vendor argued that the contract required it to pay only thirty percent of the sum obtained by multiplying excess attendees by $.05. The ASBCA ruled that the contracting officer had misinterpreted the vendor's terms. It also found that, even if the terms were ambiguous, the contracting officer had owed a duty to clarify them before awarding the contract.

Board Defines "Exposed to Public View"

The specifications for a construction project at a Marine Corps air station required the contractor to place a "smooth form finish" on all concrete surfaces that would be "exposed to public view." When a dispute arose between the parties about the meaning of the latter term, the contractor performed according to the government's direction, then filed a claim. Arguing before the ASBCA,[352] it contended that the specification did not require it to smooth the interior walls of the buildings because the general public was not free to enter these areas. The contractor also asserted that exterior walls were not visible to the general public because the government strictly controlled access to the air station. The Board, however, adopted a much broader definition of "public view." It found that, under industry standards, any object visible from a public location is in public view. It reasoned that a location is public if it is accessible to persons not responsible for its operation or maintenance. The Board concluded that, although the walls were not visible to the general public, the order to smooth the walls was proper because the walls normally *would* be visible to individuals other than the persons that maintained the buildings.

Contract Changes

Commercial Items Provision Limits Change Order Authority

The new DFARS subpart governing the purchase of commercial items discourages contract changes.[353] This subpart provides that a contracting officer may not change a product specification unilaterally. Furthermore, bilateral changes should be made only under compelling circumstances. The contracting officer must "preprice" changes unless immediate performance is required. If prospective pricing is not possible, the parties must agree to a maximum price.

Defective Specification Claims

Government Design Was One Brick Short of a Load

Jordan & Nobles Construction Co.[354] involved a project that required over nine million bricks. During construction, the brick mason had to cut over 20,000 bricks, primarily because of defective specifications. The contractor built a concrete atrium column as designed, but, when the mason laid bricks according to the project drawings, a gap remained. The GSBCA found the specification defective and concluded that the defect was latent, considering the overall size and complexity of the project. That the contractor had only one month to prepare its bid also was germane to the Board's decision.

Direction to Provide Item Different from Item Specified in Contract Attachment Was Constructive Change

Air Compressor Products, Inc.,[355] involved the negotiated acquisition of portable air breathing systems, for which the government had specified a minimum output rating for the air compressor component. Before award, the contractor sent a letter describing a noncompliant compressor to the government, but the government did not question this apparent discrepancy. The award to the contractor incorporated the letter in full. When the government discovered the error, it directed the contractor to provide a larger compressor. The contractor did so and later claimed for the difference in cost between the two models. The Board found for the contractor. As an attachment to the contract, the contractor's product description

[352] Bodell Constr. Co., ASBCA No. 38,355 (Sept. 25, 1991).

[353] *See* DFARS 211.7004-1(l); DFARS 252.211-7002.

[354] GSBCA No. 8349, 91-1 BCA ¶ 23,659.

[355] ASBCA No. 40,015 (Apr. 22, 1991) (unpub.).

took precedence over the specifications. Thus, the government constructively changed the contract when it demanded a larger compressor than the contract originally required.

Duty to Cooperate

In *Durocher Dock & Dredge, Inc.*,[356] the ENG BCA held that the government did not violate its implied duty to cooperate when it failed to provide access to a work site after a local sheriff ordered the contractor to vacate. The contractor argued that the government should have opposed the sheriff's action. The Board noted, however, that the government did not have exclusive jurisdiction over the site and that the contractor never asked the government to help it obtain access to the area. Accordingly, the government reasonably acquiesced in the sheriff's order, which had represented a permissible exercise of state police power. The Board also found that the government had not warranted the availability of the site.

Superior Knowledge

Government Lacked Superior Knowledge but Had Defective Specification

In *Hobbs Construction & Development, Inc.*,[357] the contract required the contractor to construct a "super flat" concrete floor. During performance, the contractor encountered great difficulty in meeting this requirement. It ultimately invested considerable time and money to correct deficiencies. Also during performance, the agency obtained an industry article that described an ideal method for finishing a concrete surface to meet the "super flat" tolerance. The agency, however, did not tell the contractor about the article. The contractor later claimed the added costs of meeting the specifications. The agency denied the claim.

On appeal, the contractor argued that the government had withheld superior knowledge by not alerting the contractor to a possible means of resolving the concrete-finishing problems. The Board found that the agency had owed no duty to disclose the nongovernment report and that the contractor could have gleaned similar information from the specifications. The Board sustained the appeal in part, however, because it found that the agency-prescribed method for placing the concrete had prevented the contractor from meeting the tolerance.

Government Did Not Have Superior Knowledge of Asbestos Dangers

In the 1940's, a company developed an asbestos insulation product that the Navy used in its shipyards. Many employees later developed asbestosis as a result of the widespread use of this product. The insulation producer ultimately was found liable for the asbestos-related injuries of many Navy employees. In *GAF Corp. v. United States*[358] the contractor argued that the government should indemnify it for damages because the government had failed to disclose its superior knowledge of the toxic effects of asbestos. The Court of Appeals for the Federal Circuit held that the government had had no reason to believe that the producer was unaware of the dangers of its own product and concluded that the government was not required to ask what the producer knew. The court also rejected the contractor's implied warranty argument because the government had not controlled the insulation production process, but merely had purchased a commercially-available product. Moreover, the court noted that the contractor had been found liable for its failure to warn users of the danger, *not* for selling a hazardous product.

Government Had Duty to Disclose Full Scope of Furniture Assembly Effort

The Army awarded a furniture moving contract that required the contractor to assemble boxed shelves, lockers, and cabinets. During performance, the contractor was surprised to discover that each box contained 200 or more small pieces. This made assembly much more difficult than the contractor originally anticipated. Other unexpected difficulties also contributed to an increased cost of performance. On appeal, the ASBCA ruled that the contractor was entitled to additional compensation because the government had withheld vital information that, if disclosed, would have affected the contractor's bid.[359] Specifically, the government knew that the furniture was not partially assembled per industry standard and that each furniture box contained hundreds of pieces. The Board concluded that the contractor could not have envisioned the complexity of the task and that it reasonably had decided to forego a prebid inspection of the boxes.

Contractor Had Right to Government's Most Current Workload Data

LBM, Inc.[360] involved a fixed-price contract for maintenance of heating, ventilating, and air conditioning

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[356] ENG BCA No. 5768, 91-3 BCA ¶ 24,145.

[357] ASBCA No. 34,890, 91-2 BCA ¶ 23,755.

[358] 932 F.2d 947 (Fed. Cir. 1991).

[359] Kloke Transfer, ASBCA No. 39,602, 91-3 BCA ¶ 24,356.

[360] ASBCA No. 39,606, 91-2 BCA ¶ 24,016.

equipment. To assist bidders, the solicitation disclosed historical data reflecting the past numbers of monthly service calls. The government also possessed figures for service calls performed during the six months immediately before the contract award, but it did not include this data in the solicitation. During performance, the actual volume of service calls substantially exceeded the statistics that the government had provided. The contractor sought an equitable adjustment, which the contracting officer denied. On appeal, the ASBCA found that the workload data had been only an estimate, not a contractual quantity. It ultimately held, however, that the contractor could recover under the contract's changes clause because the government had failed to provide it with current data. The Board found that the contractor had based its bid on inaccurate information that falsely implied a workload significantly less arduous than the workload the government knew the contractor actually would have to perform.

Sovereign Act Defense

Criminal Investigation Related to Contract Performance Was Not a Sovereign Act

During performance of a guard services contract, the government investigated allegations of poor performance and fraud on the part of the contractor. Investigators conducted widespread searches of the contractor's work areas and seized all of the contractor's records. In *R&B Bewachungs, GmbH*,[361] the contractor appealed the denial of its claim for the cost of reconstructing confiscated documents. Finding for the contractor, the ASBCA rejected the government's sovereign act defense because the government had conducted its disruptive probe in its contractual capacity. Addressing another claim by the same contractor, the Board found that to require the contractor to submit "typed" forms constructively changed the contract because the contractor's computer-generated forms were equivalent to those required by the contract. Significantly, neither the contract, nor any pertinent regulation, had required the contractor to type its data on the government forms.

Government Implicitly Agreed to Compensate for Sovereign Acts

The solicitation in *Old Dominion Security*[362] required the contractor to obtain security clearances for its guards. The contractor based its bid on a "regular-time" rotation of 112 guards. After award, however, the Defense Department instituted an agency-wide policy limiting the number of clearances it would approve. This action forced the contractor to reduce its staff and to pay higher overtime wages. The government denied the contractor's claim for overtime costs, asserting that the limitation on clearances was a sovereign act, for which it was not liable. On appeal, the Board found that, under the terms of the solicitation, a contractor reasonably could calculate how many clearances—that is, employees—it would need to minimize overtime expenses. A constructive change occurred when the government's policy forced the contractor to reduce its workforce and increased the contractor's overtime requirements. Although the Board agreed that implementation of the DOD policy was a sovereign act, it held that the contractor could recover because the government implicitly had agreed to compensate it for this act.

Other Remedy-Granting Clauses

Differing Site Conditions

Contractor Recovers When Site Condition Differed from Implied Condition

In *Konoike Construction Co.*[363] the Board permitted the contractor to recover unexpected costs it had incurred in removing concrete supports for hot water tanks. Notably, the barracks renovation drawings with which the government had provided the contractor did not describe the supports. Instead, the solicitation directed offerors to visit a building that was "representative" of the buildings scheduled for renovation. The tank supports in the display building were made of steel pipes that could be removed easily. Accordingly, the contractor did not bid any costs for this demolition task. During performance, however, the contractor discovered that two concrete walls—each three feet high, three feet wide, and eight inches thick—supported each tank in the buildings it had to renovate. The Board allowed recovery, finding that the contractor had encountered conditions at the site that differed materially from the conditions that the government implicitly had represented in its contract documents.[364] It also found that the contractor had taken reasonable steps to familiarize itself with the project.

No Recovery When Contractor Relied on "As-Built" Drawings Not Part of Contract

During performance of a renovation contract in *Cocoa Electric Co.*[365] the contractor (Cocoa Electric) damaged tiles on a second story floor when it drilled through them from the first floor. The government required Cocoa

[361] ASBCA No. 42,213, 91-3 BCA ¶ 24,310.

[362] ASBCA No. 40,062, 91-3 BCA ¶ 24,173.

[363] ASBCA No. 36,342, 91-1 BCA ¶ 23,440.

[364] *See* FAR 52.236-2 (discussing differing site conditions).

[365] ASBCA No. 33,921, 91-1 BCA ¶ 23,442.

Electric to replace the tiles and denied the contractor's claim for replacing them. On appeal, Cocoa Electric argued that it was not responsible for the damage because it had relied on "as-built" drawings that depicted a subfloor thicker than the existing slab. The Board denied entitlement, however, finding that the contract drawings and specifications did not represent the thickness of the subfloor and that the government had warned the contractor that the "as-built" diagrams were outdated and unreliable.

Court Pans Contractor's Repertoire of Riparian Repartees

After completing a contract to clear debris along a riverbank, Mr. Walser sought an equitable adjustment for alleged differing site conditions. He contended that he had to work longer to clear the river area than he originally estimated because the water level dropped and exposed more debris after he made his site visit. Mr. Walser also asserted that the river rose during performance, depositing even more rubble in the area. Finally, he claimed that a beaver cutting increased his workload. The Claims Court rejected all three assertions, finding that the conditions that Walser encountered were neither unusual, nor unexpected.[366] Had Walser familiarized himself with the local conditions as his contract required, he would have discovered that all of the activities that he mentioned in his claim were normal.

River Flow Tables Did Not Represent Site Condition

In *John Massman Contracting Co.*[367] the contractor completed an erosion control project on the Mississippi River after encountering delays and decreased productivity caused by swift currents. The contractor claimed that it had based its bid on river flow data that the government had attached to the contract and that it had to expend more effort when it encountered significantly swifter currents. On appeal, the Claims Court found that the river flow tables were merely guidelines. It held that this data did not constitute contract representations on which the contractor could base a category I differing site condition claim. The court also found that heavy rainfall had caused the swift currents and denied recovery because weather conditions are not differing site conditions.

Suspension of Work—Failure to Issue Notice to Proceed Was Constructive Suspension of Work

After awarding a contract for the repair of a parachute drying tower, the government discovered asbestos at the site. For this reason, inter alia, the government never issued a notice to proceed. Instead, it terminated the contract for convenience nine months after award. The contracting officer later denied the costs the contractor claimed for being "kept on the hook" during this period. On appeal, the Government argued that, because it had not issued a notice to proceed, the contractor should not have incurred any termination costs. The ASBCA, however, held that the government's failure to issue a notice to proceed within a reasonable time was a constructive suspension of work, even though work had not begun.[368] Moreover, whether the delay was the fault of the government was irrelevant because the suspension had been unreasonably long. The contractor recovered all allowable costs related to the suspension.[369]

Liquidated Damages

Liquidated Damages Were Reasonable, but Board Trims Withholding Because The Facility Was Complete

In *Brooks Lumber Co.*[370] the government claimed liquidated damages[371] against a contractor that had failed to complete a project on time. The contractor appealed, arguing that the damages were unreasonable and amounted to a penalty. It proffered evidence that rental space for the agency would have cost less than the amount the government assessed in damages. The agency, however, rebutted this evidence by showing that it had used its contracting manual to formulate the damages. The Board found that the measure of damages was presumptively reasonable because the guidance in the manual was intended to produce a reasonable estimate of delay costs. Nevertheless, it reduced the measure of damages because the government could have taken beneficial occupancy of the facility during the alleged delay.

Liquidated Damages Calculation "Out of All Proportion to Reality"

The government established liquidated damages on a construction contract at a rate of $147 per day. Its estimate of delay costs included a daily sum for oversight and inspection (six hours' work) and contract administration (three hours' work). When the contractor later failed to complete the project on time, the government withheld $15,000. On appeal, however, the ASBCA allowed the contractor to recover the entire sum withheld.[372] Finding no rational basis for the government's conclusion that

[366] Walser v. United States, 23 Cl. Ct. 591 (1991).

[367] 23 Cl. Ct. 24 (1991).

[368] M.E. Brown, ASBCA No. 40,043, 91-1 BCA ¶ 23,293.

[369] *See* FAR 52.212-12 (governing suspensions of work).

[370] ASBCA No. 40,743, 91-2 BCA ¶ 23,984.

[371] *See* FAR 52.212-5 (titled "Liquidated Damages—Construction").

[372] JEM Dev. Corp., ASBCA No. 42,645, 91-3 BCA ¶ 24,428.

inspection and oversight would take six hours per day, it held that the government had made no "fair and reasonable attempts to fix just compensation" for a delay. The Board concluded that the liquidated damages were unenforceable because they bore no relationship to the sum that the government reasonably should have estimated to be its loss if a delay occurred.

Permits and Responsibilities

Permits and Responsibilities Clause Did Not Require State Contractor's License

In *Gartrell Construction, Inc. v. Aubry*[373] the Court of Appeals for the Ninth Circuit held that a state could not require a contractor on a federal project to obtain a state contractor's license. The court reasoned that the licensing requirement conflicted with the contracting officer's duty to determine a firm's responsibility. The court rejected the state's argument that the contract's permits and responsibilities clause required the contractor to comply with state licensing provisions. According to the court, this clause was not dispositive because it merely directed the contractor to obtain all *applicable* licenses and, in this case, a contractor's license actually was inapplicable and unnecessary.

Contractor Cannot Recover for Damage to Its Own Property

In *Aulson Roofing, Inc.*,[374] the contractor parked a leased storage trailer in an area designated by the government. Strong winds blew the trailer over, destroying it. The contractor attempted to recover the cost of replacement, arguing that the government had known that the parking area was susceptible to high winds. The government denied the claim. On appeal, the ASBCA found no evidence to support the contractor's contention. It denied recovery, holding that, under the contract's permits and responsibilities clause, the contractor was responsible for all property damage stemming from its own negligence. In this case, the contractor itself was negligent because it failed to secure its trailer properly.

Authority to Contract

Exigency Imbues Authority

In *Sigma Construction Co.*[375] the ASBCA concluded that a contractor was entitled to the costs of performing additional work at the direction of government inspectors. Although the inspectors lacked contracting authority, an exigent circumstance—drying concrete—had compelled the contractor to comply immediately with the inspectors' orders. The Board also emphasized that the contract administrator, acting as the representative of the contracting officer, was present at the site when the inspectors issued their orders.

Lack of Authority Prevents Oral Contract

In *Edwards v. United States*[376] the Claims Court declined to enforce an oral modification of a Postal Service contract because it found that the contracting officer had exceeded his authority to contract. During negotiations, Mr. Edwards proposed to increase the annual cost of the agency's lease by approximately $23,000. He contended that the contracting officer had accepted orally. Postal rules and regulations, however, preclude contracting officers from accepting proposals of this nature. Accordingly, the court found that the contracting officer had lacked the authority to enter into the agreement, even if he believed he had the authority to take this action. In reaching its decision, the court carefully considered the elements of an express oral contract[377] and of accord and satisfaction.[378] It concluded, however, that neither existed because the contracting officer had lacked any authority to bind the agency.

Intent to Exercise Option Is Not an Intent to Contract

In *Eaton Corp.*[379] the Board found that the government did not order continued performance of an expired contract when it notified the contractor that it intended to exercise an option. Although the government's notice specifically warned that it did not commit the government to an extension of the contract, the contractor argued that the parties had entered into an implied contract. The Board considered whether the parties might have entered into an implied-in-fact contract,[380] but found no expression of intent by the government to contract for additional work. Likewise, it noted that no authorized government employee had ordered the contractor's continued performance after the contract expired.

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[373] 940 F.2d 437 (9th Cir. 1991).

[374] ASBCA No. 37,677, 91-1 BCA ¶ 23,720.

[375] ASBCA No. 37,040, 91-2 BCA ¶ 23,926.

[376] 22 Cl. Ct. 411 (1991).

[377] The following elements are essential to an express government contract: (1) mutuality of intent; (2) a definite offer; (3) unconditional acceptance; and (4) actual authority on the part of the government representative.

[378] The following elements are essential to accord and satisfaction of a government contract: (1) proper subject matter; (2) a meeting of the minds; and (3) a government representative acting within the scope of his or her authority to contract.

[379] ASBCA No. 38,386, 91-1 BCA ¶ 23,398.

[380] The essential elements of an implied-in-fact government contract are offer, acceptance, and actual authority on the part of the government representative.

Shipment in Response to Order from Unauthorized Employee Was an Offer to Contract

In *RMTC Systems*[381] the contractor shipped goods to the government in response to an oral request from a government employee who lacked authority to contract. Because the contractor sent the goods without first receiving a purchase order, the Department of Agriculture Board of Contract Appeals (AGBCA) held that the shipment of goods was merely an offer of sale, which the government could refuse by promptly returning the goods unopened. Noting that neither an express contract, nor an implied contract, existed between the parties, the Board concluded that the Contract Disputes Act (CDA) did not apply and dismissed the appeal for lack of jurisdiction.

Ratification of Unauthorized Commitments

In *Reliable Disposal Co.*[382] the ASBCA held that, in the absence of any convincing testimony or evidence to the contrary, when a contracting officer requested funding for the appellant's claim without commenting on its merits, he effectively ratified the unauthorized commitment. In *Romac, Inc.*,[383] the Board found that ratification occurred when an authorized government official offered to pay for additional work if the contractor could prove that it had done the work. Likewise, in *Mick DeWall Construction*[384] the Postal Service Board of Contract Appeals (PSBCA) held that the agency had ratified a commitment when the contracting officer had considered a claim on its merits and no evidence rebutted the contractor's testimony that the contracting officer's representative had obtained the contracting officer's approval to order additional work.

The Defenses of Estoppel and Laches

In *JANA, Inc. v. United States*[385] the Federal Circuit held that the defenses of laches and estoppel did not bar the government from recovering overcharges that the contractor could not justify, even though four years had passed since the government had made its last payment under the contract. To assert the defense of laches successfully, the contractor had to prove that it had been prejudiced by unreasonable and unexcused government delay. The government, however, had no knowledge of JANA, Inc.'s overcharges and no notice of the basis of the government claim until it had completed an audit. Because the delays in conducting the audit and in issuing the decision assessing the overcharges were reasonable, the defense of laches did not apply. Likewise, the court refused to apply the defense of estoppel.[386] JANA, Inc. argued that the government was estopped from asserting its claim because JANA, Inc. had relied on the agency's certifications each time it sent an invoice for payment and did not expect an audit. The court, however, found that certification did not take the place of an audit and concluded that JANA, Inc.'s reliance on the agency's action had not been reasonable. Accordingly, it ruled that estoppel was not a meritorious defense.

Repair Work Ordered by Unauthorized Employee Paid on Quantum Meruit *Basis*

After the National Guard decided not to ratify an unauthorized commitment, the Comptroller General [387] approved payment of a claim in *quantum meruit* for repair work ordered by an agency official whose contract warrant had expired. Although the contractor was entitled to payment for the work it performed, it could not recover interest on its claim because no express statutory authority permits the government to pay interest under those circumstances.

Pricing of Adjustments

Shipbuilding Contracts

The Department of the Navy has promulgated an interim rule prohibiting any military department from

> adjusting any price under a shipbuilding contract, entered into after December 7, 1983, for an amount set forth in a claim, request for equitable adjustment, or demand for payment under the contract (or incurred due to the preparation, submission, or adjudication of any such claim, request, or demand) arising out of events occurring more than 18 months before the submission of the claim, request, or demand.[388]

The Navy enacted this rule to ensure that problems are identified and settled promptly on their merits and are not allowed to accumulate. The rule applies to disputed and undisputed matters "relating to a contract" and "arising

[381] AGBCA No. 88-198-1, 91-2 BCA ¶ 23,873.

[382] ASBCA No. 40,100, 91-2 BCA ¶ 23,895.

[383] ASBCA No. 41,150, 91-2 BCA ¶ 23,918.

[384] PSBCA No. 2580, 91-1 BCA ¶ 23,510.

[385] 936 F.2d 1265 (Fed. Cir. 1991), *rev'g* No. 650-87C (Cl. Ct. Aug. 23, 1990), *reh'g denied*, (Fed. Cir. July 9, 1991) (unpub.), *petition for cert. filed*, No. 91-556 (U.S. Oct. 3, 1991).

[386] To prove estoppel against the government, a contractor must show: (1) the government knew the true facts; (2) the government intended the contractor to act in reliance on the government's conduct; (3) the contractor was ignorant of the true facts; and (4) the contractor detrimentally relied on the government's actions.

[387] Ms. Comp. Gen. B-242019, Aug. 5, 1991.

[388] 56 Fed. Reg. 63,664 (1991) (amending 48 C.F.R. §§ 5243, 5252 (1990), effective Dec. 5, 1991). This interim rule implements 10 U.S.C. § 2405 (1988).

under the contract," but does not apply to downward adjustments.

Measure of Damages

Jury Verdict Method for Measuring Damages Not Favored

In *Dawco Construction, Inc. v. United States*[389] the Federal Circuit reversed an earlier decision by the Claims Court. The Claims Court, using the "jury verdict" method, had awarded over $500,000 in damages to a contractor that had shown actual expenses of only $8100. The appellate court declared that, before the lower court may adopt the jury verdict method, it must determine that: (1) clear proof of injury exists; (2) no more reliable method for computing damages exists; and (3) the available evidence is sufficient for a court to approximate the damages fairly. Additionally, the contractor must show that no more precise method for calculating the cost of the extra work is available. A more detailed discussion of the burden of keeping adequate records of costs, and of the consequences of failing to do so, appears in *Roy D. Garren Corp.*[390] In this decision, the AGBCA reduced the recovery of a contractor that had failed to maintain adequate records to support its claim.

Shared Fault Results in Apportioned Costs

In *Dickman Builders, Inc.*,[391] a contractor sought to recover the costs of installing hot water branch piping for heating coils. It claimed that the government had required it to install piping that the contract drawings had failed to reveal. In its defense, the Government argued that the contractor had failed to inquire about a patent ambiguity before bidding and, therefore, was not entitled to additional costs. The ASBCA agreed, in part, with both parties. It found that: (1) the contractor had failed to inquire about a patent ambiguity in the contract; (2) the government had failed to advise prospective bidders of an inquiry by another bidder; and (3) contract costs had increased as a result of these two mistakes. Because the parties could have avoided the loss had *either* met its obligations under the contract, the Board resolved the appeal by apportioning the costs equally.

Recovery of Overhead

Court Approves Clause that Limits Recovery of Overhead

The Federal Circuit has upheld a contract clause that limits the amount of overhead payments on change orders. In *Reliance Insurance Co. v. United States*[392] the court affirmed the dismissal of a contractor's four claims for additional overhead based on alleged government delay. The Federal Circuit found that the claims exceeded amounts allowed by a claims limitation clause in the contract. It concluded that the clause did not conflict with the standard contractual changes clause because it did not disallow equitable adjustment claims, but only limited overhead and profit to certain percentages of the contractor's direct costs.

The *Eichleay* Formula

In *C.B.C. Enterprises, Inc. v. United States*[393] the Claims Court refused to use the *Eichleay* formula[394] to calculate extended, unabsorbed overhead when the extended performance period resulted from additional work, rather than from suspended performance. Courts and contract appeals boards normally use the *Eichleay* formula to calculate extended unabsorbed overhead damages when the government suspends performance on the contract. The Claims Court reasoned, however, that when a contractor performs additional work, it incurs sufficient direct costs that the contractor generally may be compensated adequately by applying a percentage overhead markup to direct costs. The court concluded that, because the *Eichleay* formula embraces the entire contract period, including all extensions, to "use ... [the] formula to calculate extended home office overhead due to additional work would ... produce a less accurate result."[395] Accordingly, absent an unusual or unreasonable extension of performance, the *Eichleay* formula is inappropriate for calculating overhead when a performance delay results from additional work.[396]

Miscellaneous Costs

State Income Taxes

A contractor that managed an Army ammunition plant under a cost-reimbursement contract incurred increased state income taxes as a result of a capital gain on the sale

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[389] 930 F.2d 872 (Fed. Cir. 1991); *rev'g in part* 18 Cl. Ct. 682 (1989).

[390] AGBCA No. 85-196-1, 91-1 BCA ¶ 23,306.

[391] ASBCA No. 32,612, 91-2 BCA ¶ 23,989.

[392] 931 F.2d 863 (Fed. Cir. 1991), *aff'g* 20 Cl. Ct. 715 (1990).

[393] 24 Cl. Ct. 187 (1991).

[394] "The *Eichleay* formula is named after the *Eichleay* decision, in which the ASBCA approved a formula for allocating home office overhead expense incurred during a suspension of work." *C.B.C. Enters., Inc.*, 24 Cl. Ct. at 189 n.3 (citing Eichleay Corp., ASBCA No. 5183, 60-2 BCA ¶ 2688, *aff'd on recons.*, 61-1 BCA ¶ 2894).

[395] *Id.* at 190.

[396] *Id.*

of the contractor's interest in a commercial joint venture. The contractor passed this expense off by charging it to the federal government. The Claims Court upheld the contractor's action in *Hercules, Inc. v. United States*.[397] The court relied upon Cost Accounting Standard 403,[398] which provides that home office expenses incurred for specific segments of a business should be allocated directly to those segments whenever possible and otherwise should be "grouped into logical and homogeneous expense pools and allocated on the basis of objective, measurable relationships."[399]

Labor Costs

Adjustments under contractual labor standards clauses may include only the increased costs of direct labor.[400] In *KIME Plus, Inc.*,[401] the ASBCA found that a contract's labor clause allowed a contractor to claim an adjustment for cost increases that resulted from a statutory increase in the minimum wage. The adjustment, however, included only wages and fringe benefits. It did not include additional overhead and profit.

Cost Overruns—Failure to Give Notice

A contractor forfeited its right to recover overhead cost overruns when it failed to notify the government of these overruns as the contract required. In *Systems Engineering Associates Corp.*[402] the contractor failed to prove that its overhead cost overruns had been unforeseeable or unknown. Had the contractor been ignorant of these overruns, or had it failed to anticipate them, the government would have had to pay the overrun costs. In this case, however, the contractor had an accounting system that kept it well informed of the status of its indirect rates. Moreover, under the contract, it was required to notify the government of its overruns or risk forfeiting them.

Inspection, Acceptance, and Warranties

Policy and Regulation

Centralized Reporting of Nonconforming Products

The Office of Federal Procurement Policy (OFPP) has issued a policy letter that requires agencies to exchange information about nonconforming products and materials purchased under federal contracts.[403] By imposing this requirement, the OFPP intends to ensure that products and materials that one agency identifies as nonconforming are not procured by another agency or by its contractors. The existing Government-Industry Data Exchange Program (GIDEP) will serve as the mandatory central data base for exchanging information about "failure experiences." Agency participation in other data bases will be discretionary. The letter also directs agencies to establish procedures for receiving and disseminating "sensitive information."

DOD Bans Use of Commercial Items Liability Clause

The Director of Defense Procurement has ordered DOD agencies not to use a limitation of liability clause that once applied to commercial items contracts under DFARS part 211.[404] This clause formerly required sellers of commercial items to indemnify the government and to hold it harmless "from and against all expenses, losses, claims, demands or causes of action of whatever kind ...."[405] Now, in contracts for commercial automatic data processing equipment, contracting officers shall use the standard DFARS warranty exclusion and limitation of damages clause,[406] unless a greater degree of protection is necessary. For all other commercial items, contracting officers shall use the limitation of liability clauses found in the FAR or in agency FAR supplements.

DOD Shelves Proposed Investigation Requirement

On October 8, 1991, the DAR Council withdrew a proposed rule that would have required contractors to investigate reports of quality deficiencies received after the allegedly deficient supplies had been inspected and accepted by the government.[407] The Council withdrew the proposed rule after public comment indicated that this requirement would impose an undue burden on contractors.

Inspection Cases

Minuteman Software Fizzles

The Air Force paid approximately $4 million for unusable software for the Minuteman missile system when it

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[397] 22 Cl. Ct. 301 (1991).

[398] 4 C.F.R. pt. 403 (1991).

[399] *Id.* § 403.40(a)(1).

[400] FAR 52.222-44.

[401] ASBCA No. 38,840, 91-3 BCA ¶ 24,045.

[402] ASBCA No. 38,592, 91-2 BCA ¶ 23,676.

[403] Policy Letter No. 91-3, Office of Federal Procurement Policy, Office of Management and Budget, subject: Reporting Nonconforming Products, Apr. 9, 1991.

[404] Memorandum, Office of the Under Secretary of Defense, DP/AR, subject: Contracting for Commercial Items, Sept. 26, 1991; *see also* Memorandum, U.S. Army Contracting Support Agency, Office of the Assistant Secretary of the Army, SARD-KP, subject: Acquisition Letter (AL) 91-10, Enclosure 22, Oct. 17, 1991.

[405] DFARS 252.211-7005.

[406] DFARS 252.270-7001.

[407] 56 Fed. Reg. 50,693 (1991). The DAR Council published the proposed rule in 55 Fed. Reg. 38,341 (1990).

accepted initial, partial deliveries of the software without conditioning payment upon final satisfactory performance of the total software package.[408] Although the Government later argued that the Air Force actually had conditioned its acceptance on future performance, the ASBCA found that neither the contract nor the acceptance documents indicated that acceptance was conditional. The Government also argued that the contract was voidable because of latent defects. Although the final product clearly did not work, this argument also failed to convince the Board, which pointedly noted that no defect had been present in the software when the government accepted delivery during the three-year contract.

Defective Construction—Correction versus Price Reduction

Under the standard FAR inspection of construction clause,[409] the government properly required a contractor to relocate a ditch and a paved parking lot that the contractor had built in the wrong place. In *Hunter Ditch Lining*[410] the ASBCA held that the government could require rework, instead of accepting nonconforming work at a reduction in price, because the contractor had failed to comply substantially with contract requirements and the cost of correction was not economically wasteful. The Board also ruled that the government's failure to notify the contractor promptly about defective work did not estop the government from demanding strict compliance with the contract. The Board pointed out that the government had had no actual knowledge of the nonconforming work and had not refrained deliberately from informing the contractor of the defects.

Inspectors' Silence Fails to Shift Responsibility for Defective Performance

The responsibility for contract performance did not shift to the government when its inspectors failed to halt work on a paving project after temperatures became too cool to continue.[411] The ENG BCA concluded that the inspectors had owed no duty to suspend performance because the contract specified that performance was solely the contractor's responsibility. The Board observed that the inspectors, by their silence, had done nothing improper; they neither evaded the contractor's questions, nor misinterpreted any temperature data. Furthermore, the inspectors were not actually aware that the contractor was paving when the temperature dipped below a suitable range. In sum, the government did not contribute to the contractor's nonconforming performance.

Acceptance and Warranty Cases

Government Misuse of Equipment Shifts Burden of Proof in Warranty Claim

In *R.B. Hazard, Inc.*,[412] the contractor presented evidence that a soldier had damaged a fire protection pump installed by the contractor. The ASBCA found that the government could recover under a warranty theory only if it proved that the pump's failure was not the result of government misuse and that defective material or workmanship was the most probable cause of the damage. In this case, the Government failed to present the requisite evidence and the Board found for the contractor.

Possession Shifts Risk to the Government

The standard permits and responsibilities clause generally assigns risk of loss or damage to the contractor until final acceptance by the government.[413] In *Fraser Engineering Co.*,[414] however, the Veterans' Administration Contract Appeals Board (VACAB) found the government responsible for preacceptance damage to a cooling tower constructed by a contractor. When it was damaged, the tower was in the sole possession and control of the government. Moreover, although the Board could not determine who damaged the tower, it found that the contractor had taken reasonable measures to protect it. Finally, the contract between the parties shifted the responsibility for damage from the contractor to the government, even though the government had not accepted the work finally.[415] Accordingly, the government had to bear the cost of repairing the tower.

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[408] Infotec Dev., Inc., ASBCA No. 31,809, 91-2 BCA ¶ 23,909.

[409] FAR 52.246-12.

[410] AGBCA No. 87-391-1, 91-2 BCA ¶ 23,673.

[411] B&L Constr. Co., ENG BCA No. 5708, 91-2 BCA ¶ 23,840.

[412] ASBCA No. 41,061, 91-2 BCA ¶ 23,709.

[413] FAR 52.236-7; *see also* Tyler Constr. Co., ASBCA No. 39,365, 91-1 BCA ¶ 23,646.

[414] VACAB No. 3265, 91-3 BCA ¶ 24,223.

[415] *See* FAR 52.236-11 (holding government responsible for damage it causes when it takes possession, despite contrary language in contractual permits and responsibilities clause).

Default Terminations

Regulatory Changes—Termination of Contracts for Commercial Items

As amended, the DFARS directs agencies to use a termination clause that requires contracting officers to issue cure notices to contractors before terminating contracts for default.[416] The clause, which appears in new DFARS part 211, specifically identifies five bases for default termination, including two new contractual bases—anticipatory repudiation and failure to provide reasonable assurances of future performance. The clause also reduces the period within which a contractor must prepare and submit a convenience termination settlement proposal to ninety days after receipt of the termination notice.

Performance Problems

Unreasonable Interpretation of Specifications Warrants Termination

In *Rault Center Hotel*[417] the government terminated for default a contract to provide meals and lodging to persons undergoing military enlistment processing. The ASBCA upheld this termination because the contractor had failed to comply with the procedure specified in the contract for signing meal tickets. The contract had required the contractor to provide unsigned breakfast and dinner vouchers to individuals at registration. When each individual received a meal, he or she would sign the appropriate voucher. The contractor, however, had the enlistees sign all their meal vouchers when they registered at the hotel. It gave them meal tickets when they signed their vouchers and collected the meal tickets when it served the appropriate meals. The contractor then used the signed vouchers—*not* the meal tickets—to validate the catering bills it presented to the government. This procedure obliged the government to pay for all meals, no matter how many meals the contractor actually served. The Board concluded that this was an unreasonable reading of the contract.[418]

Postal Service Cannot Terminate Contractor for Coming to Work Early

In *Jesse A. Farmer*[419] the PSBCA found that an agency had abused its discretion when it terminated a postal delivery contract for default. The Board saw no merit in the government's claim that the contractor had violated the contract by reporting for work early. Although the contractor often was the only person at the post office and would have to wait until the regular employees arrived for work, the Board found no evidence that the contractor's early arrivals had any detrimental effect on postal operations.

Government Is Entitled to Strict Compliance With Its Specifications

In *H&H Bentonite & Mud, Inc.*,[420] the GSBCA upheld the government's termination of a contract to acquire salt because the contractor had offered to provide solar salt instead of the evaporated salt that the government had called for in the specifications. The Board dismissed as irrelevant the contractor's contention that the solar salt satisfied the government's requirements, ruling that the government was entitled to strict compliance with the specifications.

Government Is Not Entitled to Strict Compliance With Its Specifications

The ASBCA rejected the government's claim that its default termination in *Defense Technology Corp.*[421] was justified because the contractor had failed to deliver first articles for testing on time—even though the contractor actually had presented only one of four first articles that the contract required it to provide. The Board reasoned that the termination was inappropriate because: (1) the government could test only one unit at a time and, thus, did not need all the articles immediately; (2) the contractor could prepare the other units for testing with only a small amount of work; and (3) the government could terminate the contract freely during the first article phase if the contractor failed to deliver the first article test results on time or if the government disapproved the first articles. The Board also noted that, although the first article had several defects, these defects could be corrected easily and did not justify rejecting the first article.

Repudiation

Anticipatory Repudiation or Abandonment of Contract Requires Clear and Unequivocal Manifestation

In *M.V.I. Precision Machining, Ltd.*,[422] the ASBCA found that the default termination of a contract for air-

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[416] DFARS 211.7005 (a)(20); DFARS 252.211-7000. A federal agency normally need not provide notice before it terminates a contract for the contractor's failure to perform on time.

[417] ASBCA No. 31,232, 91-3 BCA ¶ 24,247.

[418] The government also based its termination on various service deficiencies, including the unavailability of specific food items, unsanitary conditions, and the contractor's failure to serve meals on time. *Id.* Before it terminated the contract, the government had directed the contractor to correct these deficiencies, but the contractor never complied. *Id.*

[419] PSBCA No. 2702, 91-3 BCA ¶ 24,181.

[420] GSBCA No. 10,688, 91-3 BCA ¶ 24,334.

[421] ASBCA No. 39,551, 91-3 BCA ¶ 24,189.

[422] ASBCA No. 37,393, 91-2 BCA ¶ 23,898.

craft parts was improper. Rejecting the Government's position, the Board held that the contractor's suggestion that a termination for convenience might be in the best interests of both parties did not amount to an anticipatory repudiation. The Board added that the contractor's continued "problem solving efforts" plainly refuted the Government's conclusion that the contractor had abandoned performance.

In a similar case, *Scott Aviation*,[423] the ASBCA found that the government improperly terminated a contract for anticipatory breach. The Board found no evidence that the contractor ever manifested a definite and unequivocal intention not to perform as the contract required. Significantly, statements that the contractor made during settlement negotiations were not admissible to prove repudiation. The Board also found that, although a shortage of parts had halted actual production, the contractor never actually stopped work because its engineers and other employees continued to work on production problems.[424]

The PSBCA also differentiated between reluctance to continue and an unequivocal refusal. In *H.P. Conner & Co.*[425] the government terminated a contract for the construction of a post office because of the contractor's apparent lack of progress. The Board concluded that the termination was improper because the government never established that the contractor had refused or had failed to continue contract performance. Although the contractor had submitted letters complaining of its inability to resume work, the Board found that these letters did not amount to a refusal to continue with the work. Moreover, the Board noted that, in response to a cure notice, the contractor had assured the government that it planned to resume performance immediately. Finally, the Board declared that the contractor's consultation with an attorney was not tantamount to a decision to abandon the contract, even if the contractor had sought the attorney's help in finding a basis for avoiding the contract.

Unequivocal Manifestation of Inability to Perform Constitutes Repudiation

In *Beeston, Inc.*,[426] the ASBCA upheld the default termination of a contract for the delivery of chemical agents because the contractor's unequivocal manifestation of its inability to perform at the contract's fixed price constituted an anticipatory breach.

Waiver of Delivery Schedule

Government's Actions After Delivery Date Determine Whether Delivery Schedule Waived

Three recent ASBCA cases underscore the need for cautious contract administration when a contractor misses a delivery date. In *J.J. Seifert Machine Co.*[427] the contractor missed its April delivery date for shaft assembly bolts when its subcontractor filed bankruptcy. In May, Seifert and the government had two phone conversations, during which the contractor twice proposed a new delivery schedule. The government neither accepted, nor rejected, these proposals. In the same month, the government discovered that it no longer needed the bolts, but it neglected to tell this to the contractor. The contractor continued its production and, with the assistance of personnel from the local Defense Contract Administration Services Management Area (DCASMA) office, found a new subcontractor. The Board held that the government's subsequent termination of the contract on July 11th—just two days after the new subcontractor shipped its first batch of bolts—was improper. By failing to take decisive action when the contractor missed its April delivery date, the government effectively waived the original delivery schedule.

The ASBCA also found waiver of the delivery schedule in *Kitco, Inc.*[428] After issuing a show-cause notice threatening default termination, the government told the contractor that it was contemplating reinstating a portion of the contract that it previously had terminated for convenience and asked whether the contractor could provide the items. The contractor declared that it would continue to perform and estimated a delivery date for the goods. The Board found that the government's encouragement, viewed in light of the contractor's reliance on that encouragement,[429] amounted to a waiver of the delivery schedule to that point.

In *Eraklis Eraklidis*,[430] however, the Board did not find a waiver of the delivery schedule, even though the government had waited six months after the contract

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[423] ASBCA No. 40,776, 91-3 BCA ¶ 24,123.

[424] The government's contention that it believed the contractor had stopped work "unequivocally" probably was weakened by the Board's finding that, after receiving the contractor's alleged repudiation, the contracting officer had asked the contractor to submit a cost proposal on a proposed change order.

[425] PSBCA No. 1358, 91-3 BCA ¶ 24,270.

[426] ASBCA No. 38,969, 91-3 BCA ¶ 24,241.

[427] ASBCA No. 41,398, 91-2 BCA ¶ 23,705.

[428] ASBCA No. 38,184, 91-3 BCA ¶ 24,190.

[429] On the issue of detrimental reliance, see generally OFEGRO, HUD BCA No. 88-3410-C7, 91-3 BCA ¶ 24,206 (requiring detrimental reliance by contractor to establish waiver of delivery schedule).

[430] ASBCA No. 40,110, 91-3 BCA ¶ 24,188.

completion date before it issued a termination notice. In reaching this decision, the Board emphasized that the government had issued a stop-work order only six weeks after the delivery date—just one day after the contractor expressly refused to perform corrective work.

In *American Aerospace Technology Corp.*,[431] waiver of the initial delivery schedule for supplies did not bar the government from terminating a contractor for default when the contractor again failed to deliver on time under an extended schedule. The ASBCA noted that, when the government granted the extension, it explicitly reserved the right to terminate the contract for default.

Waiver Doctrine Does Not Apply to Construction Contracts

In *Nexus Construction Co.*[432] the government properly terminated a contract for default, even though government agents previously had urged a construction contractor to continue working and had failed to establish a new completion date after the contractor passed the original deadline. The Board distinguished construction contracts from supply contracts, declaring that, in construction contracts, the government is under no obligation to establish a new date after it waives completion within the original performance period. It noted that construction contracts have payment provisions for work done after the completion date and liquidated damages clauses to recompense the government for untimely completion.[433] The government's efforts to expedite performance, therefore, did not waive the completion date, nor did they preclude the government from terminating the contract when the contractor failed to complete the project on time.

Contractor Excuses

A Nineteen Percent Increase in Market Price Does Not Establish Impracticability

In *Beeston, Inc.*,[434] the ASBCA rejected a contractor's argument that its default should be excused because of commercial impracticability. The Board held that a nineteen percent market increase, viewed in light of the contractor's assumption of the risk of price fluctuation under the contract, did not amount to commercial impracticability. It then declared that explosions at the plants of the contractor's domestic suppliers, which caused shortages and price increases and ultimately impaired the contractor's production capabilities, did not excuse nonperformance. The Board stressed that no evidence suggested that these accidents had eliminated the domestic or worldwide supply of the contract end item completely.

Subjective Mistake Does Not Excuse Failure to Perform

In *Land-Sea-Air Machine Products, Inc.*,[435] a contractor inadvertently proposed the wrong dates for a revised delivery schedule. The government accepted the proposed schedule, but later terminated the contract for default when the contractor failed to attain production goals by the specified dates. On appeal, the ASBCA held that the contractor's mistake did not excuse the contractor's subsequent default because the government did not know when it agreed to the revised schedule that the contractor mistakenly had proposed an unrealistic schedule.[436]

Government Conduct as Excuse for Performance Failure

In *Eastern Massachusetts Professional Standards Review Organization, Inc.*,[437] insurance companies under contract to the government failed to provide data to a Medicare physicians' peer review contractor. The ASBCA ruled that this lack of data excused the contractor's subsequent failure to deliver its reports on time. As the Board noted, the insurance companies' information was essential to the preparation of the reports and only the government's agents had access to them.

Termination for default is also improper when governmental interference prevents the contractor from completing performance on time. In *John Glenn*[438] the contractor closely followed the government's directions, even when the government instructed it to lay pipe in a manner inconsistent with the contract specifications. As a result, it failed to complete construction on time. The ASBCA ultimately excused the contractor's late performance.[439]

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[431] ASBCA No. 36,814, 91-3 BCA ¶ 24,298.

[432] ASBCA No. 31,070, 91-3 BCA ¶ 24,303.

[433] *See* FAR 52.212-5 (titled "Liquidated Damages—Construction"); FAR 52.249-10 (titled "Default (Fixed Price Construction)").

[434] ASBCA No. 38,969, 91-3 BCA ¶ 24,241.

[435] ASBCA No. 38,944, 91-3 BCA ¶ 24,243.

[436] *Accord* H&H Bentonite & Mud, Inc., GSBCA No. 10,688, 91-3 BCA ¶ 24,334 (government lacked actual or constructive knowledge of contractor's mistake when it accepted the contractor's bid).

[437] ASBCA No. 33,639, 91-3 BCA ¶ 24,301.

[438] ASBCA No. 31,260, 91-3 BCA ¶ 24,054.

[439] *See also* M.A. Santander Constr., Inc., ASBCA No. 35,907, 91-3 BCA ¶ 24,050 (holding that government's refusal to allow contractor access to site until it had *all* tools and equipment on site was unreasonable interpretation of contract terms).

In *WSCON*,[440] however, the Board held that the government's failure promptly to provide a contractor with lists of government employees that had been displaced when the government contracted out did not relieve the contractor of its duty to perform under the contract. In finding for the government, the Board emphasized that the contractor had failed to show a connection between the government's delay in supplying the lists and its own failure to perform.

Similarly, in *R&B Bewachungs, GmbH*,[441] the ASBCA found that government delay in the processing of applications for good conduct certifications did not excuse a security guard contractor's failure to provide an adequate number of civilian guards for a military base. In this case, the contractor, an experienced provider of security services, knew before contract award that the government would require a good conduct certification for every guard and that obtaining certifications for enough guards to provide adequate security for the installation would take two to six weeks.

Government's Improper Refusal to Release Progress Payments Is Breach

In *Nexus Construction Co.*[442] the government improperly terminated a construction contract for default after the contractor failed to demonstrate satisfactory progress. The ASBCA held that the government's refusal to release progress payments to the contractor constituted a material breach of the contract that excused the contractor's sluggish performance.[443]

Not all monetary disputes justify nonperformance. In *A.N. Xepapas, AIA*,[444] the contractor refused to begin construction of a building unless the government agreed to the price the contractor had proposed for a change in performance. The VACAB found that this refusal to work justified the government's default termination of the contract.

Default Termination Procedures

An Orchid by Any Other Name

In *Orchids Paper Products Co.*[445] the GSBCA found the government justified in terminating a contract when the contractor failed to comply with quality control provisions by a specific date. The contractor had asserted that the termination was improper because the letter informing it of its quality deficiencies was not titled "cure notice" and did not follow the format set out in the FAR.[446] The Board rejected this argument, declaring that the content of a notice controls—not its title. Because the letter expressly identified the deficiencies and established a specific date for correction, the government had given the contractor adequate notice to cure under the default clause.

In *OFEGRO*[447] the agency's termination letter cited a contract clause entitled "Default (Fixed-Price Research and Development." On appeal, the contractor pointed out that the proper clause for the contract was "Default (Fixed-Price Supply and Service)." The Board, however, held that a party may not be denied relief simply because it has invoked a clause incorrectly. Thus, the government's citation to the wrong clause did not invalidate the default action because the proper default clause, which was incorporated in the contract as a matter of law, authorized the termination.

Termination of Surety Is Proper Even Though Termination of Original Contractor Was Not

In *Employer's Mutual Casualty Co.*[448] the GSBCA rejected a surety's argument that the conversion of the original contractor's default termination to a termination for convenience barred the government from subsequently ordering the default termination of the surety's takeover agreement. The surety had based its argument on *Carchia v. United States.*[449] In *Carchia*, the Court of Claims had construed a takeover agreement to provide that the government would be liable for additional expenses if the original contractor's termination later was found to have been wrongful. The GSBCA, however, distinguished *Carchia* factually. It focused instead on other cases that hold that a surety that enters into a takeover agreement becomes a contractor and assumes all the rights and obligations of the original contractor. The Board concluded that the conversion of the original contractor's default termination to a convenience termination did not affect the government's right to terminate the takeover agreement.

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[440] ASBCA No. 38,894, 91-3 BCA ¶ 24,293.

[441] ASBCA No. 34,430, 91-3 BCA ¶ 24,300.

[442] ASBCA No. 31,070, 91-3 BCA ¶ 24,303.

[443] *Cf.* Auto Skate Co., GSBCA No. 10,510, 91-3 BCA ¶ 24,260 (financial problems resulting from a contractor's debarment did not excuse the contractor's failure to perform).

[444] VACAB No. 3087, 91-2 BCA ¶ 23,799.

[445] GSBCA No. 10,555, 91-2 BCA ¶ 23,965.

[446] *See* FAR 49.607.

[447] HUD BCA No. 88-3410-C7, 91-3 BCA ¶ 24,206.

[448] GSBCA No. 11,003 (Nov. 14, 1991).

[449] 485 F.2d 622 (Ct. Cl. 1973).

Agency May Not Terminate for Nonperformance After Price Reduction for the Same Nonperformance

In *Union Precision & Engineering*[450] the parties agreed to extend the contract delivery date. They further agreed to reduce the contract price by $3900 if the contractor delivered on time. If, however, the contractor did not meet the revised delivery schedule, the contract price would be reduced by $39,000. When the contractor failed to meet the delivery schedule, the government reduced the contract price by $39,000 and terminated the contract for default. On appeal, the ASBCA held that the default termination was improper. It found the government had agreed expressly that the monetary reduction would be its *exclusive* remedy if the contractor failed to deliver on time.[451]

Government May Consider Contractor's Past Performance in Its Termination Decision

The government's default termination of an entire requirements contract in *General Floorcraft, Inc.*,[452] was proper, even though it terminated the contract after finding only two floor polishers deficient. Significantly, this was the second contract in which the contractor had tried, but failed, to provide polishers that met government specifications. The Board noted that the government had no reason to believe that the contractor would succeed in its latest attempt and, therefore, did not have to allow the contractor to correct the deficiencies.

Agency Cannot Terminate Contractor Without Reasonable Belief that Contract Will Not Be Completed on Time

While performing a building repair contract, the contractor in *Decker & Co.*[453] encountered unexpected conditions on the worksite that increased both the time and the effort that it had to expend to complete the work. The contracting officer agreed that differing site conditions existed and implied that she would issue a modification extending the contract completion date. After consulting with the agency's engineers, however, she terminated the contract instead. The Board found that the contracting officer's decision to terminate a contract that she believed could be completed within a properly extended performance period was arbitrary, unjustified, and unreasonable. Termination for default prior to the completion date would have been justified only if the contracting officer reasonably had believed that the contractor could not complete the project within the adjusted performance period.

Appeal of Default Termination Decisions

Default Notice May Be an Appealable Final Decision

In *Steith Construction, Inc.*,[454] the National Aeronautics Space Administration Board of Contract Appeals held that a default notice is also an appealable final decision when it states unequivocally that the contracting officer has determined that the contractor is in default and advises the contractor of its right to appeal. Contrary to the Government's position, the Board ruled that, to be final, the letter need neither include language that explicitly identifies it as a final decision, nor explain in detail the contractor's appeal rights.

Excess Reprocurement Costs

Reprocurement Costs Include Costs Reasonably Foreseeable as Result of Default

In *Milner Construction Co.*[455] the Department of Transportation Contract Appeals Board (DOT CAB) held that the government properly assessed the costs of preparing drawings, specifications, and documentation for the reprocurement of a warehouse construction contract. The Board also found that the government was justified in charging the costs of temporary storage to the contractor's reprocurement account. Each of these costs was a reasonably foreseeable result of the contractor's failure to complete the building.

Reprocurement Costs Satisfied Objective Reasonableness Standard

In *Auto Skate Co.*[456] the GSBCA observed that the government's duty to mitigate damages in an excess

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[450] ASBCA No. 37,549, 91-3 BCA ¶ 24,297.

[451] *Cf.* American Aerospace Technology Corp., ASBCA No. 36,814, 91-3 BCA ¶ 24,298 (government specifically reserved right to terminate for default in modification extending delivery schedule).

[452] GSBCA No. 10,493, 91-2 BCA ¶ 24,023.

[453] ASBCA No. 38,072, 91-3 BCA ¶ 24,354.

[454] NASA BCA No. 44-0291, 91-3 BCA ¶ 24,140.

[455] DOT CAB No. 2043, 91-3 BCA ¶ 24,195

[456] GSBCA No. 10,510, 91-3 BCA ¶ 24,260.

reprocurement case required a federal agency to obtain the best available prices. In the present case, the reprocurement costs were forty-nine to seventy-one percent higher than the prices that the defaulted contractor had offered under the original contract. Nevertheless, the Board found that the government had discharged its duty to mitigate properly and ruled that the reprocurement costs were reasonable.

Likewise, in *Milner Construction Co.*[457] the DOT CAB held that the government did not fail to mitigate damages when it denied a surety the opportunity to complete a construction project. Stating that the government was not obliged to allow the surety to complete the work, the Board concluded that the agency could select its own contractor. The Board also disagreed with the contractor's claim that the government had to deal directly with the subcontractors of the terminated contractor. It found that the government was entitled to obtain total performance from its reprocurement contractor, including the management of subcontractors and the coordination of any warranty problems with equipment suppliers.

Convenience Terminations

Termination Decision

Terminate for Convenience When in the Government's Best Interest

In *John Massman Contracting Co. v. United States*[458] the Claims Court rejected a contractor's assertion that the government should have terminated a contract for convenience, rather than for default. The court noted that the government may terminate a contract for convenience whenever exercising this form of termination is in the best interest of the United States. Contrary to the contractor's position, however, the government has no duty to terminate for convenience when a convenience termination is merely in the contractor's best interest.

Government Cannot Terminate for Convenience After Contract Performance

In *PHP Healthcare Corp.*[459] the ASBCA refused to allow the government to terminate an indefinite quantity contract for convenience after the contract had expired and the contractor had completed its contractual obligations. The Board dismissed the purported termination as an improper attempt by the government to limit its liability for failing to order goods from the contractor in minimum contractual quantities.

Convenience Termination Settlements

Percentage of Completion Is Inappropriate Basis for Termination Settlement

In *Corban Industries, Inc. v. United States*[460] the Claims Court rejected a "percentage of completion" theory that a contractor used to calculate its termination for convenience settlement. The court found that the contract's termination for convenience clause already specified an appropriate measure of recovery.

Contract Disputes Act Litigation

Jurisdiction

Unratified Purchases

In *RMTC Systems*[461] a contractor supplied computer equipment to the government without first receiving a purchase order from any authorized government representative. The contracting officer refused to ratify the unauthorized request for supplies. Under the circumstances, the AGBCA found no contract, no final decision, and no claim; therefore, no basis to assert jurisdiction existed. It declared that the contractor's delivery of goods was simply an offer of sale, which the contracting officer was free to refuse.

Submission of Claims to the Contracting Officer

The Contract Disputes Act requires contractors to submit claims to their contracting officers.[462] In *Dawco Construction, Inc. v. United States*[463] the government argued that the contractor failed to submit its claims to its contracting officer when it addressed the claims to the resident officer in charge of construction (ROICC). The court, however, noted that the ROICC eventually forwarded the claims to the contracting officer, who denied

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[457] DOT CAB No. 2043, 91-3 BCA ¶ 24,195.

[458] 23 Cl. Ct. 24 (1991).

[459] ASBCA No. 39,207, 91-1 BCA ¶ 23,647.

[460] 24 Cl. Ct. 284 (1991).

[461] AGBCA No. 88-198-1, 91-2 BCA ¶ 23,873.

[462] *See* 41 U.S.C. § 605(a) (1988).

[463] 930 F.2d 872 (Fed. Cir. 1991); *see also* Robin Indus., Inc. v. United States, 22 Cl. Ct. 448 (1991) (claim letter submitted to defense intelligence supply center, which forwarded it to contracting officer); Roy McGinnis & Co., ASBCA No. 40,004, 91-1 BCA ¶ 23,395 (sending claim letter to legal office without addressing it to contracting officer or district engineer was submission to contracting officer).

them. It concluded that the contractor met the submission requirement when the contracting officer received and considered appellant's claims. In response to the Government's objection that contractors now might lack incentive to direct claims to contracting officers, the court reminded the parties that interest on a claim does not begin to run, and the sixty-day period for issuing a final decision does not begin, until a contracting officer actually *receives* a claim.

Submission of a Proper Claim

The definition of "claim" contained in the FAR excludes vouchers, invoices, and other routine requests for payment that are not in dispute when submitted.[464] In *Yowell Transportation Services, Inc.*,[465] the ASBCA held that a contractor's letters and invoices for start-up costs at four Army depots were not claims. In these letters and invoices, the contractor had sought assistance from the government, had made no demands for payment, and had requested no final, appealable decisions.

Under some circumstances, however, even invoices may be considered claims. In *JP, Inc.*,[466] the Board found a contractor's invoices to be claims, primarily because the contractor had filed them in the context of a preexisting dispute. The Board ruled that, by rejecting the invoices and by informing the contractor that the rejection of the invoices could not be appealed, the contracting officer essentially issued a deemed denial of the appellant's claims.

The ASBCA further defined "claim" in *LaBarge Products*.[467] In that case, the government argued that a dispute involving alleged government misconduct before award was not a claim over which the Board could exercise jurisdiction. The Board agreed that government misconduct was an issue in the case. Nevertheless, it retained jurisdiction, asserting that the misconduct was only a secondary issue. The primary issue in dispute was whether the government's preaward misconduct had rendered the contract unfair—a question well within the scope of the Board's adjudicative authority.

In *Konoike Construction Co.*[468] the Board dismissed an appeal challenging a final performance report issued by the contracting officer. The contracting officer had given the contractor an unsatisfactory performance rating. The contractor argued that the unsatisfactory rating was essentially a government claim that had a severe financial impact on the contractor. The Board found that the rating was not a government claim because it was not: (1) a payment of money in a sum certain; (2) an adjustment or interpretation of contract terms; or (3) some other relief arising under, or relating to, the contract. The Board then remarked that, in any event, it could not have granted the relief the contractor had requested—that is, amendment of the performance evaluation—because an agency board cannot grant injunctive relief or compel specific performance.

In other cases, the ASBCA has held that a contractor's request for extraordinary contractual relief under 50 U.S.C. § 1431 was not a claim under the Contract Disputes Act[469] and that a claim for funds that the government allegedly improperly withheld for violations of the Service Contract Act was itself improper because the Department of Labor has exclusive initial jurisdiction over disputes requiring interpretation of the Service Contract Act.[470]

For a Sum Certain

A claim is properly quantified if the contracting officer can determine the specific amount of the claim by using simple arithmetic. In *Jepco Petroleum*[471] the contracting officer easily could have calculated the amount of a contractor's claim, given the information that the contractor had submitted with it. Therefore, the Board found Jepco Petroleum's claim to be a sum certain, even though the contractor had mentioned no specific dollar amount. In contrast, another contractor failed to quantify its claim when it submitted a claim for $96,368, but reserved the right to file alternative claims totaling either $127,240 or $414,339. The ASBCA declared in *Southwest Marine, Inc.*,[472] that this "multiple choice" claim was not a claim for a sum certain and, therefore, was not a claim under the contract or the Contract Disputes Act.

A contractor must provide a reasonably detailed breakdown of the supporting data and an explanation of how the amount was calculated, even when a claim states a sum certain. In *Anchor Fabricators, Inc.*,[473] the contractor failed to break down or to explain its claim, which exceeded $2 million. The Board dismissed Anchor Fabricators' appeal without prejudice to the contractor's right to file a new claim.

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[464] FAR 33.201.

[465] ASBCA No. 41,122 (Oct. 11, 1991).

[466] ASBCA No. 40,068, 91-1 BCA ¶ 23,607.

[467] ASBCA No. 33,593, 91-3 BCA ¶ 24,110.

[468] ASBCA No. 40,910, 91-3 BCA ¶ 24,170.

[469] Thompson Numerical, Inc., ASBCA No. 41,327, 91-3 BCA ¶ 24,169 (request for advance payment or loan based on contractor's "essentiality" is not claim); *see also* FAR 33.205.

[470] Western States Management Servs., Inc., ASBCA No. 42,627, 91-3 BCA ¶ 24,163; *see also* 29 C.F.R. §§ 4.187(f), 5.5(a)(9) (1991).

[471] ASBCA No. 40,480, 91-2 BCA ¶ 24,038.

[472] ASBCA No. 39,472, 91-3 BCA ¶ 24,126.

[473] ASBCA No. 40,893, 91-3 BCA ¶ 24,231.

Contractors Must Certify Claims Exceeding $50,000

Litigation involving certification flourished during the past year—and the end is not in sight. Since *United States v. Grumman Aerospace Corp.*,[474] courts and boards have considered repeatedly whether contractors had certified their claims properly and thus were entitled to litigate the merits of their cases. This jurisdictional issue has been a source of intense frustration for contractors. Many have pursued claims only to discover that they have wasted time and effort, expended money needlessly, and forfeited entitlement to interest that they otherwise might have recovered. Legal commentators have written several good articles about the problems of certification,[475] but the problem remains.

Contract law practitioners have advanced several proposals that may resolve the certification problems created by *Grumman* while satisfying the requirements of the Contract Disputes Act. Even so, until Congress amends the Act, or the Office of Federal Procurement Policy takes action, this area of government contracting will continue to generate considerable litigation. The following cases demonstrate some of the confusion that surrounds this area.

1. Proper Certifying Official: The FAR provides that, if a contractor is not an individual, claims exceeding $50,000 must be certified by: (1) a senior company official in charge at the contractor's plant or location involved; or (2) an officer or general partner having overall responsibility for the conduct of the contractor's affairs.[476] In *Grumman Aerospace Corp.*[477] the Federal Circuit held that the ASBCA lacked jurisdiction over the contractor's claim for costs because Grumman had failed to comply with the certification requirements of the Contract Disputes Act,[478] as implemented by the FAR.[479] The court noted that the individual serving as the contractor's senior vice president and treasurer was not a proper person to certify Grumman's claim. It emphasized that he was neither a "senior company official in charge at the contractor's plant or location involved," nor an "officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs."[480] The vice president failed the first test because he ultimately did not decide whether to present the claim, could not have pursued the claim without another's approval, and had not been present at the plant during performance of the contract. He failed the second test because he was responsible only for the contractor's financial affairs, not for Grumman's corporate operations.

In other cases concerning "overall responsibility," the courts and boards found that a chief estimator,[481] a comptroller,[482] and a vice president for administration[483] lacked overall responsibility for the conduct of their companies' corporate affairs and, therefore, were unqualified to certify their companies' claims. On the other hand, the ASBCA found that a contractor's vice president[484] and an officer serving as a contractor's executive vice president and general manager[485] bore overall responsibility and upheld their claims certifications. Read together, these decisions clearly demonstrate that one must focus on the actual duties and responsibilities of the certifying official.

A certifying official must be a *senior* company official. Thus, in *Morrison-Knudsen Services, Inc.*,[486] the ASBCA concluded that the project manager in charge of the contract lacked proper certification authority upon finding that the contractor had failed to furnish any evidence that the manager had extensive managerial experience and that the subject contract generated less than three percent of the company's total annual revenues. Similarly, in *PCL Civil Constructors, Inc.*,[487] the Board dismissed the contractor's appeal after the contractor offered an affidavit that stated that the project manager was a senior official, but offered no other proof of his authority to certify claims.

Under this test, a senior official must be *in charge of the contractor's plant or location.* In *Algernon Blair,*

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[474] 927 F.2d 575 (Fed. Cir. 1991), *cert. denied*, 112 S. Ct. 330 (1991).

[475] *See, e.g.*, Gene P. Bond, *Roadblocks to Contractor Claims: Rigid Claims Certification Requirements; Claims Certification Law as a Result of United States v. Grumman Aerospace Corporation*, Fall 1991 A.B.A. Sec. Pub. Contract L., tab *K*; Robert L. Ivey, *Claim Certification*, Fed. Pub. Briefing Papers, at 1-15 (Oct. 1991).

[476] FAR 33.207(c)(2).

[477] 927 F.2d 575 (Fed. Cir. 1991).

[478] 41 U.S.C. § 605(c)(1) (1988).

[479] FAR 33.207(c)(2).

[480] *See* FAR 33.207(c)(2).

[481] Shirley Constr. Corp. v. United States, 23 Cl. Ct. 686 (1991) (court dismissed claim, stating that existing precedent and law "is not good law in a public policy sense" and calling for a "new approach").

[482] Newport News Shipbldg. & Dry Dock Co., ASBCA No. 33,244, 91-2 BCA ¶ 23,865.

[483] Ingalls Shipbldg., Inc., ASBCA No. 38,323, 91-2 BCA ¶ 23,904.

[484] Union Boiler Works, Inc., ASBCA No. 41,857, 91-3 BCA ¶ 24,118 (corporate president anticipating retirement was "relatively inactive").

[485] Service Eng'g Co., ASBCA No. 33,783, 91-3 BCA ¶ 24,109 (duties and responsibilities were "co-extensive" with those of president).

[486] ASBCA No. 40,772, 91-3 BCA ¶ 24,171. *But cf.* Manning Elec. & Repair Co. v. United States, 22 Cl. Ct. 240 (1991) (holding that project manager was senior company official).

[487] ASBCA No. 41,881, 91-2 BCA ¶ 23,906.

Inc.,[488] the group project manager was found to be in charge because he had complete authority over the project, had the authority to submit claims without higher level approval, spent ten to twenty percent of his time at the work site, and normally talked daily to the staff at the site. In *Hall Contracting Corp.*,[489] however, the Board found that a corporate vice president was not in charge. Although the vice president was responsible for the project, he worked primarily at the home office and did not maintain a physical presence at the work site.

A senior official need not always be the sole person in charge of a site to wield certification authority. On occasion, boards have accorded this authority to one of several persons in charge of a particular plant or location.[490]

2. Proper Certification Language: Contractors must "repeat the CDA's wording verbatim or assert its substantial equivalent."[491] The boards have dismissed appeals in which certificates failed to state that the supporting data were accurate,[492] failed to state that the data were accurate to the best of the contractor's belief,[493] or stated that the "date"—rather than the "data"—was accurate.[494] Additionally, the boards have refused to permit contractors to combine two defective certifications to create one correct one;[495] to cure a defective certification with a Truth in Negotiations Act certification[496] of the same date as the Contract Disputes Act certification;[497] or to disavow the authority of the corporation's own certifying official after having litigated and lost an appeal on the merits.[498] The boards, however, have permitted contractors to supplement the record on reconsideration to demonstrate that certifying officials were located at the plants or locations involved to establish the officials' authorities to certify claims.[499]

3. Other Certification Issues: Often, a certifying official's title raises questions concerning the official's authority to certify claims. If the official's title implies that the official is qualified to certify, the government must produce evidence to show that the certifying official actually is unqualified.[500]

Fraud

Although boards lack jurisdiction to decide issues of statutory fraud, allegations of fraud often arise during contract litigation. In *Bhar, Inc.*,[501] the ASBCA acknowledged that it "lack(ed) jurisdiction to impose civil or criminal penalties for fraudulent claims or false testimony,"[502] but "invite[d] the law enforcement authorities of the United States responsible for investigating such matters to consider the circumstances of this appeal ... and to institute such actions as they deem appropriate."[503]

In *Anlagen- und Sanierungstechnik, GmbH*[504] the Board denied the Government's motion to dismiss for lack of jurisdiction, which the Government had premised upon the contractor's submission of a fraudulent claim during negotiations for a convenience termination. That the contractor may have committed fraud during negotiations did not deprive the Board of jurisdiction. It did, however, entitle the government to certain remedies, including forfeiture of the claim. After finding that it had jurisdiction in the case, the Board denied most of the contractor's costs because the contractor had failed to present credible evidence to support them.

Final Decisions

What Constitutes a Final Decision?

In *General Electric Co.*[505] the ASBCA Senior Deciding Group held that the government's demand—made pursuant to the inspection clause in the contract—that the

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[488] ASBCA No. 40,754, 91-2 BCA ¶ 23,920.

[489] ASBCA No. 41,885, 91-3 BCA ¶ 24,229.

[490] *See, e.g.*, Emerson Elec. Co., ASBCA No. 37,352, 91-1 BCA ¶ 23,581.

[491] TechDyn Sys. Corp., ASBCA No. 38,727, 91-2 BCA ¶ 23,749. The FAR requires a certification to state that: (1) the claim is made in good faith; (2) supporting data are accurate and complete to the best of the contractor's knowledge and belief; and (3) the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable. FAR 33.207(a).

[492] B&M Roofing and Painting Co., ASBCA No. 37,839, 91-2 BCA ¶ 23,975 (case dismissed after ten years and two trials).

[493] Cox & Palmer Constr. Corp., ASBCA No. 37,328, 91-1 BCA ¶ 23,652 (certification stated data were accurate to best of contractor's *knowledge* but failed to mention contractor's *belief*).

[494] Whittaker Corp., ASBCA No. 39,126 (Sept. 9, 1991).

[495] Holmes & Narver Servs. & Morrison-Knudsen Co., Joint Venture, ASBCA No. 36,246, 91-1 BCA ¶ 23,402.

[496] *See generally* 10 U.S.C. § 2306(f) (1988) (requiring contractors and subcontractors who have agreed to provide certain products or services expected to exceed $500,000 to certify submitted cost and pricing data).

[497] TechDyn Sys. Corp., ASBCA No. 38,727, 91-2 BCA ¶ 23,749.

[498] Universal Canvas, Inc., ASBCA No. 36,141, 91-3 BCA ¶ 24,049, *motion to vacate denied*, 91-3 BCA ¶ 24,179.

[499] William L. Crow Constr. Co., ASBCA No. 40,998, 91-3 BCA ¶ 24,196.

[500] United States v. Newport News Shipbldg. & Dry Dock Co., 933 F.2d 996 (Fed. Cir. 1991).

[501] ASBCA No. 38,393, 91-3 BCA ¶ 24,105.

[502] *Id.*, 91-3 BCA at 120,652.

[503] *Id.*

[504] ASBCA No. 37,878, 91-3 BCA ¶ 24,128.

[505] ASBCA No. 36,005, 91-2 BCA ¶ 23,958.

contractor repair or replace latent defects was a government claim, over which the Board might exercise jurisdiction. The majority analogized a contracting officer's demand for additional work under the inspection clause to a contracting officer's decision—under a standard warranty of construction clause—to direct repair or replacement of defective work after acceptance. It placed the government demand for correction of latent defects in the third category of "claim" recognized by the FAR and the Disputes clause—that is, "other relief arising under ... the contract." Four judges dissented in three separate opinions. They expressed concern that the majority's decision would open the door for the Board's involvement in contract administration matters—one dissenter asking whether the Board next would assert jurisdiction "when a contractor is directed to perform work under the Changes clause."

When to Issue Final Decisions?

In *Hero, Inc.*,[506] the ASBCA held that a contracting officer should have denied the appellant's request for unabsorbed overhead if the contracting officer had determined that the information that the appellant had provided did not support the contractor's housing renovation claim. To obtain a final decision, the contractor needed to submit only a "clear and unequivocal statement" giving the contracting officer adequate notice of the basis of the claim. This statement must contain sufficient information to enable the contracting officer to perform a "meaningful review of the claim."[507]

Notice of Appellate Rights

In *Overall Roofing and Construction, Inc. v. United States*[508] the Federal Circuit held that the Claims Court lacked jurisdiction to hear a case in which the only disputed issue was the propriety of a default termination. Noting that the government had not asserted a money claim against Overall Roofing, the court observed that the lower court had jurisdiction only over those matters that the parties have stated expressly and that the Tucker Act does not waive sovereign immunity except over monetary claims. Since *Overall Roofing and Construction, Inc.*, the Claims Court and the ASBCA have ruled that a final decision is defective if it advises a contractor that it may appeal a nonmonetary termination for default to the Claims Court.[509] Accordingly, DOD agency contracting officers now must include language in their final decisions that advises contractors to consider the *Overall Roofing and Construction, Inc.* decision when evaluating potential appellate forums.[510]

Claims Court Procedure

In *Twin City Shipyard, Inc. v. United States*[511] the Claims Court held that, if the government rejected a contractor's settlement offer, the Claims Court could order the government to make a formal counteroffer. The court dismissed the argument that an order of this nature would violate the separation of powers doctrine by usurping the Attorney General's authority to conduct litigation. It explained that, by issuing its order, it intended only to facilitate resolution of the case and emphasized that the government still could decide freely how much to offer the contractor, as long as it actually made an offer.

Board of Contract Appeals Procedure

Discovery

In *Michael Weller, Inc.*,[512] the contractor's inadvertent disclosure of a document protected by the work-product privilege did not waive the privilege with respect to that document. The GSBCA found that the contractor had taken adequate steps to prevent disclosure and concluded that some degree of carelessness was permissible.[513]

In *Federal Data Corp.*[514] the DOT CAB ordered the government to produce certain preaward documents that the government had attempted to withhold as protected under the deliberative process privilege. The Board permitted the government to redact material that was "rec-

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[506] ASBCA No. 39,525, 91-3 BCA ¶ 24,101.

[507] *Accord* Mitchco, Inc., ASBCA No. 41,847, 91-2 BCA ¶ 23,860.

[508] 929 F.2d 687 (Fed. Cir. 1991), *aff'g* 20 Cl. Ct. 181 (1990).

[509] The Finney Co. v. United States, No. 91-1141C (Cl. Ct. July 1, 1991) (unpub.), *recons. denied*, No. 91-1141C (Cl. Ct. July 19, 1991) (unpub.); Apex Int'l Management Servs., Inc., ASBCA No. 42,747, 91-3 BCA ¶ 24,226; Power Ten, Inc., ASBCA No. 43,026, 91-3 BCA ¶ 24,279; Marine Instrument Co., ASBCA No. 41,964, 91-3 BCA ¶ 24,289; Short Elecs., Inc., ASBCA No. 41,707, 91-3 BCA ¶ 24,287.

[510] 56 Fed. Reg. 52,440 (1991) (adding DFARS 233.211(a)(4)(v), effective Sept. 4, 1991). *See generally* TJAGSA Practice Note, *Default Final Terminations Lose Finality*, The Army Lawyer, Nov. 1991, at 37; TJAGSA Practice Note, *Default Terminations and Claims Court Jurisdiction*, The Army Lawyer, Aug. 1991 at 39.

[511] 23 Cl. Ct. 801 (1991).

[512] GSBCA No. 10,627-NHI (July 24, 1991).

[513] *Id. But see* Carter v. Gibbs, 909 F.2d 1450 (Fed. Cir. 1990) (voluntary disclosure of attorney-work-product defeated privilege).

[514] DOT CAB No. 2389, 91-3 BCA ¶ 24,063.

ommendatory or advisory in nature" or that disclosed information "in regard to prospective decisions." Nevertheless, it also ordered the agency to produce matters interpreting the existing contract and relating to matters of fact because those matters were primarily factual and, presumably, would help to clarify the matters in dispute.

In *Morris Guralnick Associates, Inc.*,[515] the government furnished an untimely response to the contractor's requests for admissions. Hoping to capitalize on the government's delay, the contractor argued that the Board should deem the requests admitted and moved for summary judgment. The Board denied the contractor's motion. It declared that ASBCA Rule 15,[516] which provides that requests for admissions will be admitted automatically if not answered within forty-five days,[517] is not a self-executing rule, and noted that the contractor had not moved to compel a response before moving for summary judgment. It added that, in any event, the delay actually had not prejudiced the contractor.

In *Gary Aircraft Corp.*[518] the parties and the ASBCA attempted to limit a voluminous record to facilitate resolution of the issues. After the government ignored an order to confine its brief to certain agreed-upon matters, the Board disregarded the government brief in its entirety. The Board appeared troubled by the government's decision to cite matters outside of the record after having been ordered to limit its brief.

In *Inslaw, Inc.*,[519] the DOT CAB refused to grant a contractor's request for suspension or dismissal of its appeal without prejudice, which the contractor had based on its own financial inability to litigate. The Board reasoned that the government had a right to obtain a timely disposition of the case.

In *Blount, Inc.*,[520] the Government asked the ASBCA to reopen an appeal to consider a document that the Government claimed was new evidence. The contractor apparently should have provided this document to the Government before the parties presented their cases, but actually did not deliver it until after the Board had decided the appeal. The Board refused the Government's request. To reopen an appeal, it observed, newly discovered evidence must satisfy two criteria: "(1) it must be material and not merely cumulative or impeaching; and (2) it must be such as to require a different result."[521] The Board held that the document was relevant, but immaterial, finding that the document merely reiterated what the Board had considered already in the documentary record before it.

Expert Witnesses

In *Lockheed Corp.*[522] the Government unsuccessfully attempted to offer the testimony of Professor John Cibinic, an expert in government contract law. Professor Cibinic would have identified certain information as either cost or pricing data. Citing Federal Rules of Evidence (FRE) 702 and 704, the Board excluded his testimony, finding that it would have presented ultimate legal conclusions. The Board considered these conclusions to be exclusively within its own province and, therefore, concluded that they were inappropriate matters for testimony.

Equal Access to Justice Act

Criminal Investigation and Debarment

In *C.B.C. Enterprises, Inc. v. United States*[523] the court denied attorneys' fees and costs that a contractor had incurred in defending against an allegedly unwarranted Criminal Investigation Command (CID) investigation and an allegedly unfair recommendation for debarment. In explaining its decision, the court remarked on the noncontractual nature of the contractor's claim, which basically sounded a cause in tort. The court further noted that the contractor had failed to establish any nexus between the government's allegedly tortious breach of implicit contract obligations—for example, the government's purported failures to act in good faith and to avoid unreasonable interference with the contractor's performance—and any express terms of the contract.

Consent to Voluntary Dismissal

In *Construction Management Associates, Inc.*,[524] the Government moved to dismiss an appeal without prejudice because a procedural flaw in the government's defective pricing claim otherwise would have deprived the Board of jurisdiction. After dismissal, the appellant applied for attorneys' fees and expenses under the Equal

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[515] ASBCA No. 41,888, 91-2 BCA ¶ 23,859.

[516] ASBCA Rules of Practice, Rule 15 (1980).

[517] *See id.*

[518] ASBCA No. 21,731, 91-3 BCA ¶ 24,122.

[519] DOT CAB No. 1609 (Oct. 28, 1991).

[520] ASBCA No. 41,604, 91-3 BCA ¶ 24,098.

[521] *Id.*

[522] ASBCA No. 36,420, 91-2 BCA ¶ 23,903 (citing United States v. Bilzerian, 926 F.2d 1285 (2d Cir. 1991)).

[523] 24 Cl. Ct. 1 (1991).

[524] ASBCA No. 39,996, 91-2 BCA ¶ 23,956.

Access to Justice Act (EAJA).[525] The Board denied the application. It held that the contractor, having succeeded only on a procedural matter that had no impact on the main issue—that is, the contractor's liability on the defective pricing claim—was not a "prevailing party" within the meaning of the Act. The Board, however, left open the possibility that the contractor later might prevail under the EAJA, depending on the final outcome of the litigation.

Pro Se Appellant

Although most EAJA requests involve attorneys, the Board granted fees and costs to a *pro se* appellant in *Goetz Demolition Company*.[526] The Board reduced appellant's recovery to reflect the percentage of issues upon which appellant had prevailed, then allowed a small amount for in-house expenses and consulting services.

Consultant Fees Incurred Before Final Decision

The Federal Circuit recently reversed a Claims Court decision in which the judge had awarded a contractor the cost of construction claim consultant fees that the contractor had incurred before the contracting officer's final decision. In *Levernier Construction, Inc. v. United States*[527] the appellate court held that the consultant's fees, which the contractor incurred in preparing an equitable adjustment claim, were incurred during proceedings before an agency contracting officer, not during a "civil action," as contemplated in the EAJA.[528] In reaching its decision, the court emphasized that "the EAJA is a waiver of sovereign immunity which must be strictly construed."

Special Topics

Bankruptcy

FAR Adds Bankruptcy Provisions

The FAR was revised to add a subpart on bankruptcy.[529] The subpart requires contracting officers to notify legal counsel of bankruptcy actions. A new clause requires contractors to notify the government within five days of filing of a bankruptcy petition.[530] Contracting officers must include this clause in all contracts that exceed the small purchase limitation.

Automatic Stay Litigation

Automatic Stay Does Not Bar Service Contract Act Enforcement

In *Eddleman v. Department of Labor*[531] a debtor in possession in a Chapter 11 proceeding obtained a stay order to prevent the Department of Labor from debarring the contractor and from liquidating[532] a Service Contract Act[533] wage underpayment claim against it. The automatic stay provisions of the Bankruptcy Code, however, do not apply to an agency action to enforce regulatory or police powers.[534] In this case, the court held that both the debarment and the administrative action to liquidate the wage underpayment were enforcement actions that the agency could take to advance the public policy set forth in the Service Contract Act. The court also noted that the government would make the wage payments under normal bankruptcy rules and that the administrative proceeding to liquidate the wage underpayment claim would not provide an underpaid employee with a priority in the bankruptcy proceeding. Finally, the court held that an order imposing the automatic stay is analogous to a permanent injunction and thus may be appealed immediately as a final order.

False Claims Act Proceedings Not Automatically Barred by Stay

In *Selma Apparel Corp. v. Burton*[535] the District Court for the Southern District of Alabama analyzed a government action under the False Claims Act in light of language in the Bankruptcy Code that exempts regulatory and police activities from the Code's automatic stay provisions.[536] Generally, an action to assert a pecuniary

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[525] *See* 5 U.S.C. § 504(a)(1988).

[526] ASBCA No. 39,129, 91-2 BCA ¶ 23,836.

[527] 947 F.2d 497 (Fed. Cir. 1991), *rev'g* 22 Cl. Ct. 247 (1991).

[528] *See* 5 U.S.C. § 504(a)(1) (1988) (limiting parties to recovery of fees and expenses incurred by the parties in connection with "an adversary adjudication"); *id.* § 504(a)(2) (permitting parties to seek award only after "a final disposition in the adversary adjudication").

[529] FAC 90-4, 56 Fed. Reg. 15,142 (1991) (adding FAR subpt. 42.9, effective Apr. 15, 1991).

[530] FAR 52.242-13 (Apr. 1991).

[531] 923 F.2d 782 (10th Cir. 1991).

[532] "Liquidation" of a wage underpayment is an administrative action to determine the amount of a wage underpayment. After the liquidation, proofs of claim under the Bankruptcy Code may be filed on behalf of the employees.

[533] 41 U.S.C. §§ 351-358 (1988).

[534] 11 U.S.C. § 362(b)(4) (1988).

[535] No. 91-0385-B (S.D. Ala. Sept. 27, 1991).

[536] 11 U.S.C. § 362(b)(4) (1988).

interest in a debtor's estate is barred by the stay. Thus, the Code will stay any action to recover a debt owed to the government. The court stated, however, that the purposes of the False Claims Act are to deter fraudulent conduct and to punish those who commit fraud, as well as to compensate the government for its losses. The court opined that, "even if the government's primary purpose was compensation for pecuniary loss, the substantial and legitimate police and regulatory interests furthered by the [False Claims Act] are of sufficient weight to qualify for the [11 U.S.C.] § 362(b)(4) exemption from the stay." Finally, the court held that the bankruptcy court could issue a discretionary stay[537] if the debtor could prove that a stay was necessary for the protection of the estate.

Automatic Stay Does Not Apply to Prepetition Disputes

In *United States v. Inslaw, Inc.*,[538] the Court of Appeals for the District of Columbia held that the automatic stay provisions of the Bankruptcy Code did not apply to property that was in the possession of the government under a claim of entitlement before the filing of a bankruptcy petition because the property was not a part of the estate. Inslaw had delivered software to the government pursuant to a contract. A dispute concerning the extent of the agency's authority to use the software then developed. The contractor subsequently filed for protection under the Bankruptcy Code. After the contractor filed the petition, the agency took no adverse action, but continued to use the software in the disputed manner. The contractor, as debtor in possession, obtained an order declaring that the agency willfully had violated the stay by continuing to use the property in breach of the contract. The order also fashioned certain remedies for alleged past wrongful acts by the agency. The court of appeals, however, reversed the district and bankruptcy courts, holding that the automatic stay cannot be used to "demand assets whose title is in dispute." The court found no compelling authority for expanding the scope of the automatic stay to cover any action that a debtor perceives to be inconsistent with its rights. Moreover, the court found that the bankruptcy court had no authority to remedy alleged past wrongful acts. Finally, the court found no basis to rule that the government had violated the stay because every alleged adverse action plainly occurred before the contractor filed for bankruptcy.

Anti-Assignment Act and Assumption of Contracts

Another court has joined the growing list of bankruptcy jurisdictions that hold that the Anti-Assignment Act[539] does not bar a debtor in possession from assuming an executory contract.[540] Although the Bankruptcy Code generally precludes assumption of executory contracts if one party can reject the performance of the party assuming the contract, *In re Ontario Locomotive & Industrial Railway Supplies, Inc.*[541] holds that this provision of the Code is not always applicable to personal service contracts. Congress designed the Anti-Assignment Act to protect the government from being forced to contract with a succession of contractors not of its own choosing. In most bankruptcy cases, however, the debtor and debtor in possession are the same persons, operating from the same facility. According to the court, under these circumstances, to allow the debtor in possession to assume the contract would not surprise the government and would not violate the Anti-Assignment Act. This interpretation of the Anti-Assignment Act and the Code gives reasoned meaning to both statutes. Accordingly, it is preferable to a construction that would allow the Anti-Assignment Act to vitiate a portion of the Code.

Bankruptcy Court Jurisdiction Over Contract Disputes Act Issues

Contract Disputes Act Claim Within Bankruptcy Jurisdiction Despite Lack of Final Decision

Following its termination for default, a contractor filed for bankruptcy. The Government submitted a proof of claim and obtained summary judgment for the contract deliverables. The debtor counterclaimed for the contract price, which the government refused to pay. The Government moved to dismiss the counterclaim for lack of jurisdiction because the contracting officer had not issued a final decision and the contractor had not appealed the decision under the Contract Disputes Act.[542] In *United* States v. MacLeod Co.[543] the Sixth Circuit resolved the resulting conflict between the Bankruptcy Code and the

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[537] *Id.* § 105.

[538] United States v. Inslaw, Inc., 932 F.2d 1467 (D.C. Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3362 (U.S. Oct. 9, 1991) (No. 91-591).

[539] 41 U.S.C. § 15 (1988).

[540] Last year we reported that a bankruptcy court seriously and cogently had questioned *In re West Elec., Inc.*, 852 F.2d 79 (3d Cir. 1988), the seminal case in this area. *See In re* Hartec Enters., 117 B.R. 865 (Bankr. W.D. Tex. 1990) (holding that assumption of executory contract under 11 U.S.C. § 365(c) is barred if one party has the right to refuse to consent to assumption, but Anti-Assignment Act does not apply to debtor in possession assuming government contract). Since then, the opinion in *In re Hartec Enters.* was vacated, pursuant to a settlement agreement. *See* United States v. Hartec Enters., 130 B.R. 929 (Bankr. W.D. Tex. 1991).

[541] 126 B.R. 146 (Bankr. W.D.N.Y. 1991).

[542] 41 U.S.C. §§ 605, 609 (1988).

[543] No. 90-3019, 1991 U.S. App. LEXIS 12510 (6th Cir. 1991) (not recommended for full text publication). Citation of this case is subject to Sixth Circuit Rule 24—if cited, a copy of the case must be served on opposing parties and the court. *See* 6th Cir. R. 24.

Contract Disputes Act by considering the purpose behind each statute. The court found that Congress had designed the Bankruptcy Code to bring all bankruptcy-related litigation into one forum. A major reason for this consolidation was Congress's desire to eliminate lengthy delays in bankruptcy matters. The court then held that the Government had submitted to the jurisdiction of the bankruptcy court by filing its proof of claim. It also found that the debtor's counterclaim was compulsory and that deferral of the matter to another forum would cause undue delay in closing the estate. For these reasons, the court did not require the debtor to obtain a final decision or to exhaust its remedies under the Contract Disputes Act.

Delays at Boards Prompt Bankruptcy Courts to Decline Deferral

The seminal case concerning deferral of contract claims in bankruptcy proceedings is *Gary Aircraft Corp. v. United States.*[544] *Gary Aircraft* established a five-part test to assist bankruptcy courts to determine whether deferral to a board of contract appeals would be appropriate. Two factors that contract law practitioners should consider under this test are: (1) the degree to which technical and esoteric issues of government contract law are present; and (2) the ability of the boards to apply their expertise quickly and uniformly to resolve claims and disputes.

In *Bagley v. United States*[545] the government claimed for unliquidated progress payments following a termination for default.[546] After the Federal Circuit overturned the default termination, the bankruptcy court found no complex issues of government contract law involved in the matter. The bankruptcy court then noted that a deferral would mean several more years of litigation. Finding this delay unacceptable, the court retained jurisdiction to determine quantum for the convenience termination claim.

Bankruptcy Courts Resolve Increasingly Complex Contract Issues—the Trend Continues

Several bankruptcy courts have demonstrated a willingness to apply complex government contract principles during bankruptcy proceedings. In *In re Chateaugay Corp.*[547] the court extended the government contractor defense to a nonmilitary contract—specifically, to a Postal Service contract for mail trucks. In *In re Bicoastal Corp.*[548] the court determined whether the sale of a subsidiary by a prime government contractor was the closing of a segment that triggered a refund to the government of excess payments to a defined pension plan.[549]

The assertion of "core" jurisdiction over issues that arguably are merely "related to" the bankruptcy proceedings may be unconstitutional. The Supreme Court held in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[550] that Congress could not vest bankruptcy courts—which do not derive their authority from Article III of the United States Constitution—with jurisdiction to decide traditional contract issues, if those issues are before the bankruptcy court solely because of a previously filed bankruptcy petition. This evolving area of the law merits close attention in the coming years.

Government Furnished Property

Regulatory Changes

Fee or Profit on Cost of Facilities

The FAR now clarifies that, regardless of the type of contract used, no profit or fee will be allowed on the cost of facilities when they are purchased for the account of the government under any agreement other than a facilities contract. Although this has been the general rule for some time, it now is incorporated expressly in the FAR.[551]

Contractor Use of Government Motor Vehicles

Contractors normally use their own motor vehicles during contract performance. Even so, the FAR Council has added a number of changes to the FAR concerning government-provided motor vehicles.[552] An agency now may provide a contractor with government-owned or government-leased vehicles throughout the performance of the contract.[553] An agency, however, may provide vehicles only when: (1) the number of vehicles the contractor requires is predictable and is expected to remain

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[544]Gary Aircraft Corp. v. United States (*In re* Gary Aircraft), 698 F.2d 775 (5th Cir. 1983), *cert. denied*, 464 U.S. 820 (1983).

[545]Bagley v. United States (*In re* Murdock Mach. and Eng'g Co. of Utah), No. 90PB-0601 (D. Utah May 1, 1991) (unpub.).

[546]The Federal Circuit converted the default termination to a termination for convenience. Murdock Mach. and Eng'g. Co. of Utah v. United States, 873 F.2d 1410 (Fed. Cir. 1989).

[547]No. 86-B-11270, 1991 Bankr. LEXIS 1537 (Bankr. S.D.N.Y. Oct. 21, 1991).

[548]124 B.R. 593 (Bankr. M.D. Fla. 1991).

[549]*See* FAR 31.201-5; Cost Accounting Standard 413, 4 C.F.R. pt. 413 (1991) [hereinafter CAS].

[550]458 U.S. 50 (1982).

[551]55 Fed. Reg. 52,796 (1991) (adding FAR 45.302-3(c), effective Jan. 22, 1991).

[552]FAC 90-3, 55 Fed. Reg. 52,796 (1991) (amending FAR 45.304, effective Jan. 22, 1991).

[553]Note, however, that federal law still prohibits the use of government vehicles for home-to-work transportation. 31 U.S.C. § 1344 (1988); 41 C.F.R. § 101-38.301-1 (1991).

constant; (2) the proposed contract will bear the entire cost of the vehicles; (3) prospective contractors do not have, or would not be expected to have, an existing and continuing capability for providing the vehicles from their own resources; and (4) the agency expects that the use of government-provided vehicles will result in substantial savings to the government.[554]

Inventory Schedule Certifications

The FAR Council amended FAR 45.606-1(b) to require contractor employees to sign the contractor's inventory schedule certificate if they have the authority to bind the contractor. This ensures that each firm's management understands and accepts the contractual obligations implied by the schedule and that the data the management provides is accurate.[555]

Foreign Military Sales

The DAR Council revised the DFARS to permit the rent-free use of government production and research property on foreign military sales contracts.[556]

Contractor Assumed Risk by Using Damaged Government Furnished Property

In *Universal Canvas, Inc.*,[557] the Army awarded a contract for the manufacture of medical hospital tent liners. The agency provided government furnished property (GFP) to the contractor under the terms of the contract, which incorporated the standard government property (fixed-price contract) clause.[558] During performance, Universal Canvas experienced numerous problems, which it blamed on defective GFP. The contractor submitted a $3 million claim on this basis, which the contracting officer denied. On appeal, Universal Canvas alleged that it had incurred delays and additional costs because of the deteriorated, unsuitable canvas that the government had provided for the tent liners. The ASBCA, however, found that Universal Canvas had noticed apparent water damage to the canvas when it first received it, but had failed to notify the government of this damage as the government property clause required. Accordingly, the Board denied the appeal. It held that Universal Canvas had assumed the risk of increased costs when it used the damaged property, instead of segregating it and obtaining an appropriate credit, which the government had advised.

Payment and Collection

Regulatory Changes

The DAR Council amended DFARS subpart 232.5 and added a clause at DFARS 252.232-7008 to implement the Defense Department's customary and uniform progress payment rates for contracts awarded on or after July 1, 1991, through March 31, 1992.[559] The DAR Council will publish rates for subsequent years in the first quarterly DAC for each calendar year. The customary uniform rates for July 1, 1991, through March 31, 1992, are eighty-five percent for large business, ninety percent for small business, and ninety-five percent for small disadvantaged business. This change does not affect progress payment rates for the repair, maintenance, or overhaul of naval vessels.[560]

The DFARS was also amended to reflect the Defense Department policy of assisting small disadvantaged businesses by paying them as quickly as possible after receipt of invoices. The amendments specifically provide for payment before the normal payment due dates established in the contracts.[561]

Debt Collection Act

DCA Did Not Govern Withholding to Recoup Contract Overpayments

Pursuant to the standard economic price adjustment clause, a contracting officer reduced the price of a multiyear, fixed-price contract for the development and production of an aircraft engine. The administrative contracting officer later refused the contractor's two requests for progress payments because, considering the reduction in the contract price, the contractor had been overpaid through previous progress payments. The contracting officer also denied the contractor's subsequent claim for the withholding. On appeal, the ASBCA found

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[554] *Cf.* Ms. Comp. Gen. B-238663, July 29, 1991 (absent specific statutory authority, agencies may not pay employees on fee basis for use of privately-owned transportation while conducting official business).

[555] FAC 90-4, 56 Fed. Reg. 15,154 (1991) (effective May 15, 1991).

[556] DAC 88-17, 56 Fed. Reg. 9087 (1991) (amending DFARS 245.405, effective Feb. 1, 1991).

[557] ASBCA No. 36,141, 91-3 BCA ¶ 24,049.

[558] FAR 52.245-2 (contractor must notify government if property is not suitable for use and, as directed by contracting officer, must repair or otherwise dispose of property at government expense).

[559] 56 Fed. Reg. 31,342 (effective July 1, 1991).

[560] *See* 10 U.S.C. § 7312 (1988) (these rates are established by the Secretary of the Navy).

[561] DAC 88-19, 56 Fed. Reg. 60,072 (1991) (amending DFARS 232.9, effective Nov. 15, 1991).

the agency's action proper.[562] It concluded that the withholding of progress payments is "an act of contract administration[,] rather than a collection of a debt invoking the procedural requirements of the [Debt Collection Act]." In *Allied Signal, Inc. v. United States*[563] the Federal Circuit affirmed, reasoning that a "'debt'... contemplates an existing liability by the contractor, rather than a denial of further liability by the Government within an on-going contract."

Withholding on One Contract to Recover Amount Owed on Another Contract Is Subject to Debt Collection Act

In *Cecile Industries, Inc.*,[564] the government sought to recover an overpayment on one contract from funds owed to the contractor on two other contracts. The government informed the contractor of its intent to withhold the funds, but failed to advise the contractor of its rights under the Debt Collection Act (DCA). The trustee in bankruptcy appealed, alleging that the withholding was improper because the government had failed to comply with the DCA. The ASBCA noted that the DCA would not apply had the government withheld funds under a contract to offset an overpayment under the same contract. It concluded, however, that withholding payment under one contract to recover funds owed under another was indeed an administrative offset that was subject to the DCA. Because the government had failed to advise the contractor of its rights under the DCA, the Board held that the offset was improper.

Allegation That Government Failed to Comply With Debt Collection Act Procedures Is a Contract Claim

In *Lockheed v. Garrett*[565] a federal district court refused to consider whether the Navy had violated mandatory DCA procedures, describing that issue as a contractual claim that the ASBCA would have to resolve. The Navy had demanded the return of more than $124 million in progress payments following the default termination of Lockheed's contract for antisubmarine aircraft. Lockheed, which already had filed an appeal with the ASBCA, sought to enjoin the Navy from offsetting the $124 million until after the ASBCA had resolved the default termination issue. The court, however, declared that offset procedures are acts of contract administration and, thus, are "within the exclusive jurisdiction of the ASBCA and the Claims Court under the Tucker Act."

Progress Payments

Subcontractor May Sue for Release of Progress Payments

In *Wallace O'Connor International, Ltd. v. United States*[566] the Claims Court held that a subcontractor on a State Department construction project had standing to sue the government directly. Shortly after beginning performance, the subcontractor had informed the government that the prime contractor was delinquent in remitting progress payments for the subcontractor's work. The government entered into an agreement with the subcontractor, guaranteeing payment for materials it supplied under its subcontract. Under the agreement, the government paid the subcontractor directly and received credit for all payments it made on the prime contractor's behalf. Because the government expressly assumed responsibility to pay the subcontractor, the court held that the subcontractor had standing to sue the government for release of progress payments for the subcontractor's materials, which the prime contractor wrongfully had retained.

Failure Properly to Consider Collection Deferment Request Bars Agency from Collecting Progress Payments

The district court in *Lockheed Corp. v. Garrett*[567] asserted jurisdiction to review Lockheed's allegation that the Navy had failed to comply with regulatory policies governing the review of Lockheed's collection deferment request. In October, 1991, the court found for Lockheed and enjoined the Navy from offsetting $124 million in unliquidated progress payments that Lockheed had demanded after the government terminated its aircraft production contract.[568] The court found that the Navy's failure to comply with the Defense Contracting Financing Regulations[569] or to consider the possibility of overcollection[570] in its review of Lockheed's deferment of collection request justified injunctive relief pending Navy reconsideration of the request.

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[562] Allied-Signal Aerospace Co., ASBCA No. 37,248, 90-1 BCA ¶ 22,448.

[563] Allied Signal, Inc. v. United States, 941 F.2d 1194 (Fed. Cir. 1991).

[564] ASBCA No. 40,813, 91-3 BCA ¶ 24,099.

[565] Lockheed Corp. v. Garrett, No. CV 91-1042-ER (C.D. Cal. May 16, 1991); *see* 55 Fed. Cont. Rep. (BNA) 803 (June 3, 1991).

[566] 23 Cl. Ct. 754 (1991).

[567] Lockheed Corp. v. Garrett, No. CV 91-1042-ER (C.D. Cal. May 16, 1991), 55 Fed. Cont. Rep. (BNA) 803 (June 3, 1991).

[568] *See* 56 Fed. Cont. Rep. (BNA) 677 (Nov. 18, 1991).

[569] 32 C.F.R. § 13.112 (1991).

[570] *See* FAR 32.613.

Contracting Officer Settlement Payment Presumed to Include Interest

In *Paragon Energy Corp.*[571] the ENG BCA attempted to clarify the calculation of interest under the Contract Disputes Act. The contracting officer previously issued a unilateral modification, paying the contractor $10,000 for a claim. The Board decided that issuing the modification reflected the contracting officer's determination that the contractor's claim had some merit. The Board then presumed that the contracting officer had complied with applicable law and regulations that required him to include interest on this payment. Accordingly, the Board found that the amount by which the contracting officer had increased the contract price included both an "amount found due" and the interest required by the Contract Disputes Act.[572]

Defective Pricing

Cost or Pricing Data

Wholesale Price List Is Data that Must Be Disclosed, Even if the Government Could Not Qualify for Prices

In *P.A.L. Systems Co.*[573] the solicitation required contractors to provide the government with a list of wholesale prices for all classes of customers prior to negotiations. Before negotiations, the contractor provided the government with a wholesale price list that was substantially higher than one it gave the government after negotiations. The contractor maintained that it had developed the two different price lists for different kinds of wholesalers and that the government could not meet the terms and conditions for purchasing under the lower wholesale price list. The GSBCA, however, held that the contractor should have provided both wholesale lists to the government, even though the government may not have been entitled to the lower wholesale prices. The Board further held that the government could recover for overcharges resulting from the contractor's defective pricing data because it had been prevented from negotiating lower prices.[574]

Existence of Bid on Different Contract Is a Datum that Must Be Disclosed

In *The Boeing Co.*[575] the ASBCA held that a subcontractor's outstanding bid on a different contract was a datum within the meaning set out in both the Truth In Negotiations Act[576] and the Defense Acquisition Regulations.[577] The Board also found that the subcontractor satisfied its disclosure obligations under TINA by informing the prime contractor of the outstanding bid.

Potential Bars to Defective Pricing Claims

Government Defective Pricing Claim Is Not Subject to Six-Year Statute of Limitations

In *Radiation Systems, Inc.*,[578] the ASBCA held that the government's defective pricing claim under the Contract Disputes Act was not subject to the six-year statute of limitations[579] that restricts actions the government brings for money damages. The contractor had submitted defective cost or pricing data in 1983, which the government uncovered in a DCAA audit in 1986. In 1990, the government issued a final decision, asserting a government claim and reducing the contract price in accordance with the price reduction clause of the contract. Although almost seven years had passed since the contractor had submitted the defective data, the Board rejected the contractor's argument that the claim should be barred by the statute of limitations. Instead, the Board adopted the Federal Circuit's rationale that a Contract Disputes Act claim of this sort is not an action brought by the government for money damages, but an "administrative appeal by a contractor from a contracting officer's decision that the contractor owes the Government [money]."[580]

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[571] ENG BCA No. 5302, 91-3 BCA ¶ 24,349.

[572] The real lesson from this case appears in the concurring opinion by the Board's Chairman, Judge Solibakke:

> Application of the "presumption of regularity" in this instance is a wonderfully useful legal fiction unlikely related to any real probability, but nevertheless seems reasonable in light of the language and intent of the Contract Disputes Act. As Judge Sheridan remarks, the "amount found due" was "not ... likely even consciously considered" by the Contracting Officer. The contracting officer will doubtless now be amazed at how truly deceptive he was—after the fact. The apparent difficulty of dealing realistically and rationally with interest—legislatively, judicially and administratively—is a never-ending source of amazement and frustration to me.

[573] GSBCA No. 10,858, 91-3 BCA ¶ 24,259.

[574] *Accord* Millipore Corp., GSBCA No. 9453, 91-1 BCA ¶ 23,345.

[575] ASBCA No. 33,881 (Feb. 14, 1991), *motion for recons. denied*, 1991 ASBCA LEXIS 335 (Aug. 19, 1991) (unpub.).

[576] 10 U.S.C. § 2306a(g) (1988).

[577] The contract contained DAR 7-104.29(a), a clause titled "Price Reduction For Defective Cost and Pricing." The Board used the "cost or pricing data" definition at DAR 3-807.1(a)(1).

[578] ASBCA No. 41,065, 91-2 BCA ¶ 23,971.

[579] 28 U.S.C. § 2415 (1988).

[580] 91-2 BCA ¶ 23,971 at 119,983 (quoting S.E.R., Jobs for Progress, Inc. v. United States, 759 F.2d 1 (Fed. Cir. 1985).

Dissolved Corporation Is Subject to Defective Pricing Claim

In *P.A.L. Systems Co.*[581] the GSBCA held a dissolved corporation subject to a defective pricing claim, even though the government had delayed asserting the claim for over four years.[582] The Board applied the state law under which the contractor was incorporated, which, in this case, provided that a dissolved corporation could continue to sue and be sued in perpetuity.

Price Reduction

Calculation of the Reduction

After deciding that the defective pricing claim in *P.A.L. Systems Co.*[583] was proper, the GSBCA held that the defective pricing refund should be measured in accordance with the percentage by which the unit prices had been misrepresented. It calculated the refund by applying a fixed percentage to total sales for each different sized unit.[584]

A $268.39 Cost Overstatement on $1.7 Billion Contract Is "De Minimis"

An additional basis for the government's defective pricing claim in *The Boeing Co.* was the subcontractor's overstated labor cost.[585] Although the ASBCA agreed that the subcontractor had overstated its labor cost, it ultimately held that the subcontractor's $268.39 overstatement on a $1.7 billion contract was "de minimis." Accordingly, the Board found that the contract was not increased by "any significant sum" within the meaning of TINA.

Related Criminal Law Decisions

Contractor Certification to Government Estimate Is Not a False Statement

In *United States v. Johnson*[586] the Eighth Circuit reversed a contractor's conviction for making a false statement in a certificate of current cost or pricing data. The government had instructed the contractor to submit a cost proposal and attendant certification for a proposed modification, based on a government estimate of the number of windows that needed replacing at a specific site.[587] The contractor, however, ultimately replaced far fewer windows than it had certified in its cost proposal would be replaced. Nevertheless, the court found that the contractor could not be convicted of making a false statement in the cost proposal about the number of windows it would replace because the contractor had relied reasonably on the government's directives.

Remedies Under False Claims Act Are Not Limited by Truth in Negotiations Act

In an unpublished decision,[588] the Claims Court held that the Truth in Negotiations Act[589] does not preempt the False Claims Act[590] and is not the government's exclusive remedy.

Costs and Cost Accounting

The past year has seen a number of significant developments in the costs and cost accounting areas. The most significant of these is the continuing effort of the revitalized Cost Accounting Standards Board to modify, clarify, and extend Cost Accounting Standards (CAS). Many hope that, through its endeavors, the Board will fill the many gaps and rectify the inequities identified in the cost accounting practices over the past years. Several important decisions and changes concerning cost principles also arose over the past twelve months.

Cost Accounting Standards

The Cost Accounting Standards Board announced its final rules of operation in April 1991.[591] Since then, the Board has solicited public comments on a number of ini-

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[581] GSBCA No. 10,858, 91-3 BCA ¶ 24,259.

[582] The Board also held that, although the government made this claim more than four years after it learned of the basis of the claim, it was not barred by the doctrine of laches because the government's delay in bringing the claim did not prejudice the contractor. *Id.*, 91-3 BCA at 121,287.

[583] GSBCA No. 10,858, 91-3 BCA ¶ 24,259.

[584] The percentage was one minus the ratio of the wholesale price disclosed after negotiation to the originally disclosed wholesale price. *Id.*, 91-3 BCA at 121,288.

[585] ASBCA No. 33,881 (Feb. 14, 1991), *motion for recons. denied*, 1991 ASBCA LEXIS 335 (Aug. 19, 1991).

[586] 937 F.2d 392 (8th Cir. 1991).

[587] The contract called on the contractor to install 1124 previously purchased windows. *Id.* at 393. Upon inspection, the parties discovered that many of the windows were damaged and could not be used. *Id.* at 393-94. The modification was a lump sum price for replacement of the unusable windows, estimated by the government to be 313. *Id.* at 394. The government also issued a letter stating that it intended to use windows with minor defects. *Id.* The false statement allegations arose because the windows that actually had to be replaced were significantly fewer than the government had estimated. *See id.* at 397 & n.5.

[588] Communication Equip. and Contracting Co., Inc. v. United States, No. 72-88C (Cl. Ct. Aug. 23, 1991).

[589] 10 U.S.C. § 2306(f) (1988).

[590] 31 U.S.C. § 3729 (1988).

[591] 56 Fed. Reg. 19,302 (1991).

tiatives[592] to revise existing standards and has held several public meetings.

Several federal courts also have attempted to interpret the CAS. In *General Electric Co. v. United States*[593] the Federal Circuit upheld a lower court decision that addressed the foreign selling costs cost principle.[594] General Electric alleged that this principle was unenforceable because its use of the term "allocable" conflicted with CAS 410.[595] The Federal Circuit upheld the cost principle, adopting the Claims Court's rationale that the regulation really meant "allowable."

In *Hercules, Inc. v. United States*[596] the federal government challenged Hercules' allocation of state income tax on the capital gain from a sale of stock in a solely commercial subsidiary. The government alleged that Hercules should not allocate the tax to its operating units, which included a government-owned, contractor-operated facility. The tax, however, was an allowable home office expense and its allocation was regulated by CAS 403. Because Hercules' allocation method did not comply fully with CAS 403, the Claims Court deferred final decision pending receipt of additional evidence.

In *In re Bicoastal Corp.*[597] a federal bankruptcy court held that a contractor's sale of all the stock it had held in a subsidiary was a "segment closing" under CAS 413. Accordingly, it found that the government could recover from the former subsidiary's over-funded pension plan. In *NI Industries, Inc.*,[598] the ASBCA rejected the government's argument that a pension plan termination was the equivalent of a segment closing under CAS 413. The Board, however, did agree that the termination of the plan had resulted in a credit to the government, and it allowed recovery of the plan's residual assets.

Specific Cost Principles

Independent Research and Development and Bid and Proposal Costs

In September 1991, the Defense Department amended DFARS 231.205-18 to implement legislative changes that Congress had enacted in 1990, which had expanded the categories of research eligible for reimbursement.[599] Congress, however, then revisited the issue, revising 10 U.S.C. § 2372 completely.[600] Most significantly for contractors, the new law phases out the ceilings on reimbursement for IR&D costs and B&P costs.[601] Congress also directed the Secretary of Defense to revise DOD regulations in accordance with the statute.[602]

Advertising Costs

Federal Acquisition Circular 90-4[603] amended FAR 31.205-1 to allow certain foreign selling costs. The cost principle also was amended expressly to disallow the costs of corporate celebrations.

Educational Institutions

Educational institutions received considerable attention last year. The widely reported investigation of Stanford University's accounting for federally-funded research resulted in significant changes to university accounting practices. Most significantly, the Office of Management and Budget (OMB) revised OMB Circular A-21, *Cost Principles for Educational Institutions*.[604] The revised circular limits the administrative costs that the government will reimburse to twenty-six percent of an institution's modified total direct costs, as defined in the circular. Further, OMB Circular A-21 now extends to educational institutions many cost principles that previously had applied only to commercial organizations. To eliminate overhead pools inflated with unallowable costs, the circular now requires educational institutions to certify their indirect costs—much as the government requires contractors to do under DOD commercial contracts. Additionally, Congress has funded an additional fifty DCAA auditors to review university contracts.[605] Overall, the proposed changes should bring university

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[592] *See* 56 Fed. Reg. 12,571 (1991) (extending CAS to civilian agencies); 56 Fed. Reg. 27,780 (1991) (unfunded pension costs); 56 Fed. Reg. 28,780 (1991) (revised thresholds); 56 Fed. Reg. 41,151 (1991) (fully-funded, defined benefit pension plans); 56 Fed. Reg. 42,079 (1991) (asset valuations following business combinations); 56 Fed. Reg. 50,737 (1991) (applicability to educational institutions).

[593] 969 F.2d 679 (Fed. Cir. 1991).

[594] Defense Acquisition Reg. (DAR) 15-205.6(f)(ii)(B) prohibited the allocation of direct selling costs for foreign military sales and foreign commercial sales of military products to government contracts for domestic requirements. The purpose was to prevent United States taxpayers from paying any portion of these expenses.

[595] Cost Accounting Standard 410 regulates the allocation of overhead and general and administrative expenses, such as selling costs, to final cost objectives, such as government contracts. *See generally* 4 C.F.R. pt. 410 (1991).

[596] 22 Cl. Ct. 303 (1991).

[597] 124 B.R. 593 (Bankr. M.D. Fla. 1991).

[598] ASBCA No. 34,943 (Nov. 29, 1991).

[599] 56 Fed. Reg. 46,520 (1991) (finalizing interim rule that was effective Aug. 19, 1991).

[600] National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 802, 105 Stat. 1290, ___ (1991).

[601] *Id.*; *see also supra* notes 23-24 and accompanying text.

[602] *See* National Defense Authorization Act for Fiscal Years 1992 and 1993 § 802, 105 Stat. at ___ (1991).

[603] 56 Fed. Reg. 15,153 (1991) (effective May 15, 1991).

[604] 56 Fed. Reg. 50,227 (1991) (effective Oct. 1, 1991).

[605] H.R. Rep. No. 102-328, 102d Cong., 1st Sess. 72 (1991).

cost accounting practices closer to those of commercial organizations that perform government contracts.[606]

Byrd Amendment

In *Construcciones Aeronauticas, S.A.*,[607] the GAO considered an allegation that a successful offeror—an Israeli firm owned by the Israeli government—violated the Byrd Amendment[608] by failing to disclose lobbying on its behalf by Israeli officials. The record clearly established both the lobbying and the contractor's failure to disclose. The GAO, however, observed that the Byrd Amendment does not require a contractor to disclose information about lobbying by its employees. Nor does it apply to foreign government representatives that are not paid with federal funds. The GAO also found that federal law did not require the offeror to disclose payments for transportation and other expenses connected with the lobbying because the recipients of the funds themselves did not lobby. This decision narrowly interprets an ambiguous cost principle and explains why very few contractors to date have disclosed lobbying activities.[609]

Legal Costs

One category of costs that is disputed constantly is litigation costs. Federal Acquisitions Circular 90-3[610] clarified several related cost principles, including fines and penalties, professional and consultant services, and legal and other proceedings costs. Several cases also have addressed legal costs. In *Anlagen- und Sanierungstechnik, GmbH*[611] the ASBCA denied a contractor recovery of legal expenses that the contractor had incurred in preparing a bad-faith termination claim because those costs were unreasonable. In *Hugo Auchter, GmbH*,[612] a different case involving the same law firm, the appellant failed to introduce any documentary evidence of a fee arrangement, time spent, hourly rates, or invoices submitted and paid to support its claimed legal expenses. Testimony indicated the fee arrangement was a contingent fee, which the Board properly disallowed.

In *General Dynamics Corp.*[613] the ASBCA wrote another chapter in the saga of General Dynamics' efforts to recover approximately $30 million in criminal defense costs that arose from its Division Air Defense System (DIVAD) engineering development contract. During the criminal proceedings, General Dynamics had segregated its legal costs properly[614] and had excluded the costs from all proposals for fixed-price contracts.[615] In this appeal, General Dynamics alleged three contractual bases for recovery: (1) the language of the applicable cost principle;[616] (2) the doctrine of reformation for mutual mistake; and (3) the government's purported breach of an implied contractual duty through DCAA's allegedly negligent audit of the DIVAD contract. After analyzing the language of the cost principle and its "regulatory history," the Board concluded that the cost principle did not afford General Dynamics an independent right of recovery. Accordingly, recovery of the legal fees would have to be determined by the provisions of individual contracts. Absent an advanced agreement to the contrary, General Dynamics could not recover the fees on fixed price contracts. Turning to the alleged contract breach by negligent audit, the Board noted that a tort claim for negligent audit was pending in federal district court. To promote comity and the efficient use of scarce judicial resources, the Board suspended further proceedings on the breach claim, pending resolution of the parallel judicial proceeding.

Personal Compensation

In *The Ralph M. Parsons Co.*[617] the government challenged an employee stock ownership plan as unreasonable compensation. The Government's expert witness used data from different years and different industries from those at issue. Noting that the contractor had presented convincing evidence from the appropriate time and industry that had tended to show that its plan actually had been reasonable, the ASBCA found the Government witness's testimony insufficient to prove unreasonableness. In another, more successful government challenge to

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[606] *See also supra* notes 49-50 and accompanying text.

[607] Ms. Comp. Gen. B-244717, Nov. 14, 1991.

[608] 31 U.S.C.A. § 1352 (West Supp. 1991) (limiting the use of appropriated funds to influence the award of federal contracts or grants).

[609] *See* Government Accounting Office, *Federal Lobbying—Lobbying the Executive Branch*, GAO/T-GGD-91-70 (Sept. 25, 1991).

[610] 55 Fed. Reg. 52,782 (1990) (effective Jan. 22, 1991).

[611] ASBCA No. 37,878, 91-3 BCA ¶ 24,128.

[612] ASBCA No. 39,642, 91-1 BCA ¶ 23,645.

[613] ASBCA No. 39,500 (Dec. 16, 1991).

[614] Cost Accounting Standard 405 requires covered contractors to segregate unallowable costs. *See* 4 C.F.R. § 405.40 (1991).

[615] FAR 31.103(a) requires use of the cost principles when performing cost analysis on negotiated, fixed-price contracts.

[616] FAR 31.205-47; DAR 15.205-52.

[617] ASBCA No. 37,931, 91-1 BCA ¶ 23,648.

compensation, *GTE Government Systems Corp.*,[618] the contractor had sought reimbursement for the costs of discounts in an employee stock purchase plan. Under Internal Revenue Service (IRS) regulations, however, the discounts were not deductible from gross income for income tax purposes. Because deductibility under IRS regulations was an express requirement for allowability, the Board disallowed the costs. In *American Geometrics Construction Co., Inc.*,[619] the government disallowed compensation of an owner who did not pay himself a salary. The owner withdrew money from the business account only when he made a profit on a job. Thus, the Board concluded that the cost was a distribution of profit, not compensation.

Uncompensated Overtime

One issue that affects contracts for professional and technical services in particular is that of uncompensated employee overtime. In *General Research Corp.*[620] a protester challenged the agency's adjustment of its proposed costs to delete uncompensated overtime. The protester's existing overtime practice was consistent with its past accounting practices and was not prohibited by the solicitation. Therefore, the Comptroller General decided that the adjustment was unreasonable. After the Comptroller General rendered this decision, the Defense Department announced an interim rule[621] implementing 10 U.S.C. § 2331.[622] Evaluation factors in solicitations for services contracts now should discourage contractors from using uncompensated overtime by providing for an evaluation of the technical quality of the services they perform.

Precontract Costs

In *Radant Technologies, Inc.*,[623] the ASBCA applied the four-element test set forth in the cost principle that governs precontract costs.[624] Because the parties were negotiating a contract and the contractor had started work to meet the desired delivery schedule, the costs met the FAR test for allowability. That the contracting officer was ignorant of the costs and that the costs later proved unnecessary did not foreclose recovery. The element of the test, "pursuant to negotiation," meant that parties were negotiating, not that they had agreed to precontract costs. The element of the test, "necessary to comply with proposed delivery date," meant that, when the contractor incurred precontract costs, it reasonably believed that the costs were necessary.[625] This test is much easier to meet than many government contract law practitioners believe.

Business Combinations

In *Times Fiber Communications, Inc. & Times Microwave Systems, Inc.*,[626] the ASBCA allowed a contractor to "step up" the assets of a company that it had acquired in a very complicated merger. The Board distinguished *Marquardt v. United States*[627] as a mere stock purchase, remarking that the merger in *Marquardt* did not create a new legal entity. Conversely, it noted that in *Times Fiber* the business combination was similar to a sale of assets, with the purchaser recording a book value based on the fair market value of the purchased assets.

Leases

As part of its convenience termination claim, a contractor sought lease costs for a two-year period following the end of the contract term. The contractor, however, introduced no evidence to show that so long a lease would have been necessary to perform the contract; accordingly, these lease costs were not reasonable termination costs.[628]

Audit

In *JANA, Inc. v. United States*[629] a contractor failed to retain labor records that would have supported all of the hours that the contractor had billed under a time and materials contract. Because the contractor had a contractual duty to keep the records, it was entitled to payment only for the work-hours actually verified in the records.

Intellectual Property

Technical Data and Trade Secrets

Prisoners Have Trade Secrets, Too!

Last year we reported on *Lariscey v. United States*,[630] in which the Claims Court held that a federal prisoner

[618] ASBCA No. 37,176, 91-2 BCA ¶ 23,987.

[619] ASBCA No. 37,734 (Oct. 31, 1991). An alternative ground for denial of the claimed costs was that appellant had failed to keep contractually required payroll records that showed the hours it actually had worked.

[620] Comp. Gen. Dec. B-241569, Feb. 1, 1991, 91-1 CPD ¶ 183.

[621] 56 Fed. Reg. 43,986 (1991) (adding DFARS 215.605(c)(70), effective Aug. 19, 1991).

[622] This statute directs the Defense Department to promulgate regulations that discourage the use of uncompensated overtime on professional and technical services contracts.

[623] ASBCA No. 38,324, 91-3 BCA ¶ 24,106.

[624] *See* FAR 31.205-32.

[625] *See also* Seaworthy Sys., Inc., ASBCA No. 41,202, 91-2 BCA ¶ 23,808 (contractor could recover costs incurred before task order issued).

[626] ASBCA No. 37,301, 91-2 BCA ¶ 24,013.

[627] 822 F.2d 1573 (Fed. Cir. 1987) (contractor could not step up assets when it incurred no costs during the business combination).

[628] TDC Management Corp., DOT CAB No. 1802, 91-3 BCA ¶ 23,091.

[629] 936 F.2d 1265 (Fed. Cir. 1991).

[630] 20 Cl. Ct. 385 (1990).

could not claim a process that he had developed in the prison workshop as trade secret because he had made no effort to keep the process secret when he showed it to Defense Department and prison officials. The Claims Court also held that, even if the inmate had a trade secret, the government had a shop right in the process because the prisoner had used prison property and materials in perfecting it. In 1991, however, the Federal Circuit reversed this decision.[631] The Federal Circuit held that merely to develop the process in a federal prison was sufficient effort to protect the process from discovery by competitors. Further, it found that Lariscey did not forfeit his trade secret protection by demonstrating his process for prison and Defense Department officials in the prison workshop because these displays were not public disclosures. Finally, the court ruled that Lariscey's after-hours use of discarded—or stolen—materials was insufficient to confer a shop right on the government. Significantly, this case shows that the Federal Circuit is willing to consider trade secret claims favorably. The court undoubtedly will accord similar favorable treatment to claimants in future decisions regarding rights in technical data.

In *Hex Industries, Inc.*,[632] the GAO considered a protester's ten-year history of declining to protest disclosures of its technical data in competitive solicitations and concluded that the protester had waived any trade secret protection it may have had.

Reverse Engineering

In *Kitco, Inc.*,[633] the government loaned a spare part to Kitco so that Kitco could reverse-engineer the part and obtain approval to produce it for the government as an alternative source. Kitco submitted its reverse-engineered drawing to the government with a limited rights legend. The government approved the design, but later distributed copies of the drawing to competitors in subsequent competitive acquisitions. Kitco protested. The GAO declined to follow decisions of other jurisdictions[634] that summarily assert that reverse-engineered drawings cannot be trade secrets. The GAO found, however, that Kitco had failed to produce any evidence that its drawing met the common-law definition of a trade secret set forth in the *Restatement of Torts*.[635] Moreover, the GAO declared that the government's initial contribution of a free part ultimately entitled the government to unlimited rights in the reverse-engineered drawings, regardless of the lack of an express contract to develop the drawing. Although the GAO apparently construes trade-secret law more strictly than many courts do, the GAO and the courts clearly agree that the *Restatement* represents the federal common law in this area.

Deferred Ordering of Data

In *General Atronics Corp.*[636] the ASBCA analyzed a contract data requirements list and the associated data item descriptions to determine whether the contract required the contractor to provide the government with manufacturing data describing spare parts for an end item. The Board noted that the contract required deferred delivery of manufacturing drawings for procurable spares and that the contractor had identified procurable spares during a prior development contract. Furthermore, the contract contained a special provision that granted the government unlimited rights in the drawings. Under these facts, the Board held that the contractor had to deliver the drawings and the government had to pay their reproduction costs. The decision demonstrates the utility of special provisions granting unlimited rights in technical data.

Advisory Commission on Data Rights

Congress has directed the Defense Department to refrain from prescribing final technical data rights regulations to implement 10 U.S.C. § 2320[637] until an advisory committee considers the matter and recommends draft regulations, which the Secretary of Defense then must consider.[638] Although the committee report is due June 1, 1992, the committee probably will not meet this deadline, given the extremely diverse and, as yet, undetermined membership of the committee and the lack of identifiable resources presently committed to the project.

DFARS Commercial Products Clause

The new DFARS commercial item clause[639] is substantially shorter than the standard DFARS rights in technical data and computer software clause.[640] The

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[631] Lariscey v. United States., No. 90-5129 (Fed. Cir. Nov. 15, 1991).

[632] B-243867, Aug. 30, 1991, 91-2 CPD ¶ 223.

[633] Comp. Gen. Dec. B-241133, Jan. 25, 1991, 91-1 CPD ¶ 73, *motion for recons. denied*, 91-1 CPD ¶ 488.

[634] *See, e.g.*, SI Handling Sys., Inc. v. Haisley, 753 F.2d 1244 (3d Cir. 1985).

[635] *See* Restatement of Torts § 757, comment b. (1939).

[636] ASBCA No. 37,923, 91-3 BCA ¶ 24,047.

[637] This statute directs the Secretary of Defense to issue new technical data regulations with certain mandatory provisions. *See* 10 U.S.C. § 2320(a)(1) (1988).

[638] National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 807, 105 Stat. 1290, (1991).

[639] DFARS 252.211-7015 (May 1991) (technical data and computer software—commercial items clause).

[640] DFARS 252.227-7013 (Apr. 1, 1984).

commercial items clause preserves existing distinctions between technical data, computer software, and commercial computer software found in the standard clause. The commercial clause allows the government unlimited use of technical data and computer software that is in the public domain, or that the contractor has delivered without restrictions. It also allows the government unlimited use of any technical data that it may purchase to document modifications to commercial items. The government has a limited right to disclose all other technical data and computer software when disclosure is necessary to facilitate emergency repairs or overhaul of any commercial item that the contractor has furnished under the contract to which the clause applies. It also may disclose this information to contractors who provide it with support under the same or a related contract. Additionally, the government may: (1) use computer software on backup computers; (2) create an archival backup; and (3) modify and combine the computer software with other software. The clause, however, distinguishes software that qualifies as "commercial computer software." The government may use commercial computer software only in accordance with the contractor's standard commercial license. The clause permits the government to negotiate a modified license, but only if the contracting officer determines in writing that the standard license is not in the government's interest. The commercial items clause does not state whether the government must comply with all terms of a commercial license or only with those terms that relate to intellectual property rights to use and disclose the data and the software.

Fraud

Fraud Justifies Default Termination

Fraud Was Ground for Default, Even if the Agency Was Not Aware That It Occurred

In *Bhar, Inc.*,[641] (Bhar) the Army contracted for plastic training magazines for machine guns. To save costs, Bhar proposed to use reground polyethylene material (regrind) in its fabrication process. The Army, however, rejected this proposal. It expressly forbade Bhar to use regrind because magazines produced with recycled material might be defective. After the Army terminated the contractor for failing to deliver the magazines, it discovered that Bhar knowingly had used regrind extensively to manufacture the magazines, while representing that no regrind had been used. The Board upheld the termination for Bhar's failure to deliver. Significantly, it also found that Bhar's unauthorized use of regrind justified termination even though the Army had not been aware of this deception when it terminated the contract.

Criminal Acts Justified Default Termination

In *James E. Norman*[642] the contracting officer terminated a highway transportation contract after the contractor admitted to Postal Service inspectors that he had stolen or embezzled the contents of various letters. On appeal, the contractor argued that the termination was a breach of contract. He claimed that his misconduct was an isolated incident and that his twenty years of faithful performance clearly showed that he was capable of rehabilitation. The Board disagreed. It found that the contractor had violated the terms of the contract by engaging in the criminal misconduct and that the termination was justified.

Fraud in Part Taints the Whole

In *Brown Construction Trades, Inc. v. United States*[643] a contractor sought to recover payments allegedly owed for work accomplished before the government terminated it for default. While this action was pending, the contractor and its vice president were convicted of fraudulent acts relating to the terminated contract. The government then moved for summary judgment, arguing that the contractor's fraud had rendered the claim unenforceable, both as a matter of public policy and under the law. The Claims Court found for the government, pointing out that concern for the integrity of the procurement process precluded the court from enforcing a contract that had been tainted by fraud. Although the fraud related to a modification that involved only seven percent of the claimed amount, the court concluded that "only through the remedy of nonenforcement [could] the procurement system free itself of the suspicion of frauds gone undetected."[644] The court also opined that, under the forfeiture statute,[645] it could not segregate the tainted claim and allow an action to continue on the remainder.[646]

Plea to Size Misrepresentation Conspiracy Did Not Void Contract

In *Danac, Inc.*,[647] the ASBCA held that an owner's guilty plea to conspiracy to misrepresent a contractor's size status did not bar the contractor absolutely from

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[641] ASBCA No. 38,393, 91-3 BCA ¶ 24,105.

[642] PSBCA No. 2967 (Nov. 26, 1991).

[643] 23 Cl. Ct. 214 (1991).

[644] *Id.* at 216.

[645] 28 U.S.C. § 2514 (1988) (any person who attempts or commits fraud against the United States in the presentation or proof of a claim forfeits that claim).

[646] *Brown Constr. Trades*, 23 Cl. Ct. at 216. *See generally* Procurement Fraud Division Note, *Does It Really Pay to Offer a Bribe? (It May Cost More Than You Think)*, The Army Lawyer, Nov. 1991, at 57.

[647] ASBCA No. 30,227 (16 Oct. 1991).

recovery on a company claim. The Board found that the plea was not an admission that the accused had committed a particular act. Likewise, after reviewing the record in the conspiracy case, the Board was not convinced that the accused had pleaded guilty to conspiring to misrepresent the company's size. Finally, the Board noted that, although the SBA had found that Danac was not a small business, the government had allowed the contractor to continue performance of the contract.

Misconduct of Corporate Agents

Board Imputes Officer's Ultra Vires Acts to Corporation

In *Umpqua Excavation & Paving Co.*[648] the Board found a corporation vicariously liable for fraud committed by its agent. In this case, a corporate vice president had pleaded guilty to conspiring to falsify weight certificates so that his employer could obtain more money from the government than it actually was entitled to receive under the contract. The guilty plea barred the contractor from denying the submission of false weight certifications before the Board, even though the government never brought any charges against the company itself. According to the Board, whether the contractor was charged, or whether the acts were beyond the scope of the contractor's corporate power, was immaterial. The vice president had acted within the scope of his employment for the benefit of the corporation; thus, his fraudulent acts were attributable to the corporation.

Criminal Conduct by Contractor's "*Handelsmakler*" Is Not Imputed to Contractor

In *Fleischzentrale Sudwest, GmbH*[649] (FZS), the government awarded a purchase order to FZS for meat. The company used a "*handelsmakler*,"[650] who received a commission for each side of meat that passed government inspection. After learning that the *handelsmakler* had tried to bribe government meat inspectors, the government terminated FZS for default, premising this termination on the *handelsmakler*'s misconduct. The contracting officer then offset anticipated reprocurement costs against proceeds due under the purchase order. *Fleischzentrale* appealed. On review, the ASBCA found that, although the *handelsmakler* had been an agent of FZS, he had lacked authority to offer gratuities to the government inspectors. No FZS officer or employee ever authorized him to offer the gratuities and he was not listed on any document as an FZS company official. The Board held that the *handelsmakler* was only a point of contact and, thus, the United States could not impute his criminal conduct to FZS.

Recovery Under Program Fraud Civil Remedies Act

On December 14, 1990, the Army filed its first complaint under the Program Fraud Civil Remedies Act (PFCRA).[651] The complaint alleged that a subcontractor and its president had falsified certifications relating to retainer rings on the transmissions of Bradley Infantry and Cavalry Fighting Vehicles. On March 1, 1991, the contractor paid the Army $15,000.[652] This is the first PFCRA recovery by a DOD agency or military service since Congress enacted the statute in 1986.

False Claims Act

Treble Damages Amendments to False Claims Act Are Not Retroactive

In *United States v. Murphy*[653] the Sixth Circuit held that the 1986 amendments[654] to the False Claims Act, which authorized the government to recover treble damages from fraudulent claimants, did not apply retroactively to acts committed between 1980 and 1985. The appeals court reversed the decision of a lower court, which had followed *Bradley v. School Board of Richmond*[655] and had applied the 1986 amendments upon finding that retroactive application would not work a manifest injustice on the defendant.[656] On appeal, Murphy had argued that the more recent case of *Bowen v. Georgetown University Hospital*[657] applied. In *Bowen* the Supreme Court ruled that a court must not apply a law

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[648] AGBCA No. 84-185-1, 91-1 BCA ¶ 23,452.

[649] ASBCA No. 37,373 (Nov. 20, 1991).

[650] A *handelsmakler* negotiates agreements for others on a commission basis, but is not entrusted to do so permanently by contract. The *handelsmakler* was not an employee of FZS, but an independent broker.

[651] 31 U.S.C. §§ 3801-3812 (1988) (administrative remedy under which agencies may impose penalties of $5000 for each false or fraudulent claim or statement submitted, with a jurisdictional cap of $150,000 for any group of related claims).

[652] Memorandum, Office of the Judge Advocate General, U.S. Army, DAJA-PF, Mar. 18, 1991, subject: Army Procurement Fraud Advisor's Update No. 7.

[653] 937 F.2d 1032 (6th Cir. 1991).

[654] Pub. L. No. 99-562, § 2(7), 100 Stat. 3153 (amending 31 U.S.C. § 3729 (1982)).

[655] 416 U.S. 696 (1974) (if legislative history is silent on retroactivity, the court must determine whether retroactive application would result in "manifest injustice"; if injustice would occur, the court must apply law in effect when it renders its decision).

[656] *See Murphy*, 937 F.2d at 1036 (summarizing unpublished opinion of the District Court for the Eastern District of Tennessee setting forth the decision to grant Government's motion for summary judgment); *see also* SGW, Inc. v. United States, 20 Cl. Ct. 174 (1990) (holding that retroactive application is not unjust, that the amendments merely corrected an outdated compensatory scheme to reflect the increase in litigation costs, that the amendments did not affect substantially the contractor's rights or obligations, and that a retroactive application best served the public interest).

[657] 488 U.S. 204 (1988).

retroactively unless the law's language clearly indicates that Congress intended a retroactive application. The Sixth Circuit agreed with Murphy. It noted that neither the language of the Act, nor its legislative history, addressed retroactivity. The court also recognized other post-*Bradley* decisions that hold that statutes affecting substantive rights and liabilities are presumed to be prospective only. It then found that the 1986 amendments actually did affect Murphy's rights and liabilities. In the Sixth Circuit before 1986, Murphy could have been found liable for his offense only upon a clear showing that he actually had known that his claims were false. After Congress enacted the amendments, mere constructive knowledge of the claim's falsity would be sufficient. The court further noted that, under the amendments, Murphy's liability would be $1 million more than it would have been, had he been tried before 1986.

Public Disclosure Exclusion Does Not Bar Government Employee *Qui Tam* Actions

In *United States ex rel. Williams v. NEC Corp.*[658] Williams alleged that, while he was employed by the government, he had learned that a contractor (NEC Corp.) had engaged in bidrigging with one of its subsidiaries. He informed his superiors. When they failed to take action, Williams filed a *qui tam* suit. The district court, however, held that *qui tam* actions by government employees are excluded by the "public disclosure" provision of the False Claims Act.[659] The Eleventh Circuit reversed, holding that the Act did not bar a government employee from filing a *qui tam* action based upon information that he or she had acquired while working for the government, unless the information was issued by Congress, an administrative agency, or the GAO. The court declined to consider whether Williams was an original source of the information, stating that that inquiry was pertinent only if the court determined factually that Williams had based his *qui tam* suit on publicly disclosed information.[660]

Jeopardy Does Not Bar Conviction for Violations of General and Specific Conspiracy Statutes

In *United States v. Lanier*[661] a contractor, its president, and its general manager were convicted under one statute of conspiring to steal government property and to defraud the United States[662] and, under another statute,[663] of conspiring to defraud the United States by obtaining payment of false claims. The defendants had conspired among themselves, and with certain government officials, to bill the government for fuel oil that never was delivered. The defendants appealed their convictions, alleging that, under the Double Jeopardy Clause, participants in a single conspiracy could not be convicted under both the general conspiracy statute (18 U.S.C. § 371) and a specific conspiracy statute (18 U.S.C. § 286).

The Eleventh Circuit disagreed. The court noted that in *Albernaz v. United States*[664] the Supreme Court had upheld dual convictions under two specific conspiracy statutes, even though the evidence had demonstrated clearly that only one conspiracy ever existed. Under *Albernaz*, courts should presume that Congress intends different statutes to address different crimes—even when those crimes arise from only one conspiracy—when each statute requires a specific element of proof that the other does not. Although both statutes prohibited agreements to defraud the government in *Lanier*, the court noted that each statute required an element of proof not required by the other. Because the two statutes required diverse elements of proof, the court concluded that the Double Jeopardy Clause did not prohibit the conviction and sentencing of the defendants for violations of both the general and the specific conspiracy statutes.

Suspension and Debarment

Agency Head to Designate Overseas Suspension and Debarment Official

Under the DFARS, as rewritten, the overseas suspension and debarment appointment authority will be the agency head instead of the Commander in Chief.[665]

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[658] 931 F.2d 1493 (11th Cir. 1991); *accord* United States *ex rel.* Hagood v. Sonoma County Water Agency, 929 F.2d 1416 (9th Cir. 1991).

[659] 31 U.S.C.A. § 3730(e)(4) (West Supp. 1991) (court lacks jurisdiction over any action based upon public disclosure of allegations or transactions unless the action is brought by the original source of the information or by the Justice Department).

[660] The court explicitly rejected the reasoning in United States *ex rel.* LeBlanc v. Raytheon Co., 913 F.2d 17 (1st Cir. 1990) (holding that government employee could not qualify as "original source" if the employee's job required the employee to uncover fraud).

[661] 920 F.2d 887 (11th Cir. 1991), *cert. denied sub. nom.* Stevens v. United States, 112 S. Ct. 208 (1991).

[662] 18 U.S.C. § 371 (1988) (if persons conspire to defraud the United States or any agency, and one or more persons act toward the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both).

[663] *Id.* § 286 (whoever enters into an agreement, combination, or conspiracy to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false, fictitious, or fraudulent claim, shall be fined not more than $10,000 or imprisoned not more than ten years, or both).

[664] 450 U.S. 333 (1981).

[665] 56 Fed. Reg. 36,314 (1991) (replacing DFARS 209.473-2 with DFARS 209.403(1), effective Dec. 31, 1991).

Factors to Consider Before Debarring Contractor

In an ongoing effort to standardize suspension and debarment procedures throughout the federal government, the FAR Council added a list of ten examples of remedial measures or mitigating factors that a debarring official should consider before taking action.[666] This change will affect civilian agencies more than it will affect DOD agencies because most of the examples that the Council listed could be found already at DFARS 209.406-1.

Lack of Conviction or Judgment on Collusive Bidding Agreement Did Not Preclude Debarment

The Fourth Circuit upheld a Defense Logistics Agency's (DLA) debarment decision against a contractor suspected of collusive bidding.[667] After reviewing the debarment provisions of the FAR,[668] the court declared that the FAR authorizes an agency to debar a contractor for any cause that is so serious or compelling that it affects the contractor's present responsibility. The court concluded that a conviction or civil judgment is not a prerequisite to debarment and that the DLA properly based its debarment decision on the contractor's grave misconduct.

Conviction Is "New Fact or Circumstance" Justifying Extension of Debarment Period

In 1985, the DLA debarred for three years a contractor and its owner, James Wellham, for willfully failing to perform in accordance with the terms of its contracts and for other serious misconduct. The improprieties that gave rise to this debarment began in 1982 and continued through 1983. In 1987, after a three-year federal investigation, Wellham pleaded guilty to two counts of making false official statements in connection with the contracts his company had performed from 1982 to 1983. The court sentenced him to a prison term of one year and one day. After Wellham served his sentence, the DLA informed him that it intended to debar him again, based on his recent conviction. Wellham challenged the DLA's action, alleging that the 1985 debarment had encompassed the same wrongdoing for which the DLA now sought to debar him. Wellham claimed that the DLA's action violated the FAR.[669] The Eleventh Circuit disagreed. In *Wellham v. Cheney*[670] it held that the DLA properly debarred Wellham a second time because Wellham's conviction formed an independent legal basis for debarment and the second debarment thus was not based solely on the facts upon which the agency had relied in the first debarment.

De Facto Debarment

In *Pittman Mechanical Contractors, Inc.*,[671] the GAO found that contemporaneous nonresponsibility determinations involving similar procurements that derived from current information indicating the contractor's lack of responsibility did not constitute a de facto debarment.

Due Process Does Not Require Administrative Law Judge to Preside Over Debarment Procedures

In *Girard v. Klopfenstein*[672] the Ninth Circuit held that the FAR debarment procedures[673] comport with fundamental fairness requirements, even though an administrative law judge does not preside over them. The court noted that the debarring official was not a member of an investigative branch of the agency and that the FAR does not merge the functions of prosecutor and decisionmaker.

Taxation

Tax on Government-Owned Equipment Used and Maintained by Contractor Is Unconstitutional

In *United States v. Nye County, Nevada*,[674] the Ninth Circuit found unconstitutional the imposition of a state personal property tax on government-owned equipment that was used and maintained by a federal contractor. In reaching its decision, the court noted that Nye County had not attempted to segregate and tax the contractor's possessory interest or beneficial use of the property, but instead had taxed the defense contractor as if it were the owner of the equipment. The court concluded that the county's assessment was an unconstitutional *ad valorem* tax on federal property.

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[666] 56 Fed. Reg. 67,129 (amending FAR 9.406-1, effective Feb. 25, 1992).

[667] Leitman v. McAusland, 934 F.2d 46 (4th Cir. 1991).

[668] FAR 9.406-2.

[669] FAR 9.406-4(b) (agency may not extend debarment solely on basis of facts upon which initial debarment action was based).

[670] 934 F.2d 305 (11th Cir. 1991).

[671] Comp. Gen. Dec. B-242499, May 6, 1991, 91-1 CPD ¶ 439.

[672] 930 F.2d 738 (9th Cir. 1991), *cert. denied sub. nom.* Girard v. Agriculture Stabilization Serv., Dep't of Agric., 112 S. Ct. 173 (1991).

[673] FAR 9.406-3.

[674] 938 F.2d 1040 (9th Cir. 1991).

State May Apply Sales and Use Taxes to Federal Facility Contractor

The Ninth Circuit affirmed a decision barring the United States from obtaining a refund of California sales and use taxes paid by an independent contractor that operated and managed a federal facility.[675] The court rejected the Government's sovereign immunity argument that disbursing funds to the contractor to pay state taxes was a constitutional function. The court cited a number of decisions that hold that the imposition of state sales and use taxes on federal contractors is constitutional if the states do not tax the United States or its instrumentalities directly.

Government Information Practices

Use of FOIA in Bid Protest Was Lack of Diligence by Protester

In *Adrian Supply Co.*[676] the GAO discussed the relationship between the Freedom of Information Act (FOIA)[677] and its bid protest rules.[678] After receiving an agency's administrative report, Adrian Supply determined that a critical document was missing. It requested the document, not under the GAO rules, but under the FOIA. By the time Adrian Supply received the document in response to its FOIA request, the GAO had dismissed the protest for failure to respond to the agency report. Adrian Supply filed a new protest based on the information contained in the document it had received through the FOIA. The GAO dismissed the second protest as untimely.[679] The GAO noted that, had the contractor availed itself of the GAO document production rules, it would have known of the basis for its second protest within ten days of receiving the agency report. When a protester chooses not to use GAO document production rules, but relies instead on the FOIA, the protester bears the risk that it will not receive the information in time to comply with the GAO's timeliness rules.

Agency Inspection Reports Exempt from Release

In *Hopkins v. Department of Housing and Urban Development*[680] the Second Circuit held that predecisional recommendations in a government inspection report that relate to a contractor's performance were exempt from release under FOIA exemption 5.[681] The agency had refused to release the inspection reports *in toto* because they contained predecisional recommendations. Although the court agreed that the reports contained some predecisional information, it held that the agency should have separated and released the factual information, withholding only the exempt predecisional information. The court then ordered an *in camera* examination of the inspection reports to determine which portions were releasable.

Names and Home Addresses of Contractor Employees Exempt from Release

In two virtually identical decisions, the courts of appeals for the District of Columbia and the Second Circuit held that the names, home addresses, and phone numbers of contractor employees contained in certified payroll records submitted to the government were exempt from release under FOIA exemption 6.[682] Exemption 6 requires agencies to balance the public's interests in disclosure against the individual's privacy interest in the information. In *Painting and Drywall Work Preservation Fund, Inc. v. Department of Housing and Urban Development*[683] and in *Hopkins v. Department of Housing and Urban Development*[684] the two courts found no public interest in disclosures of the names and addresses of contractors' employees because these disclosures would not advance the underlying purpose of the FOIA—that is, to allow public access to the inner workings of the government. Moreover, the courts noted that to release the names, home addresses, and phone numbers of contractor employees along with their pay records would allow recipients of that information to compute the actual earnings of the employees. This clearly would be an unwarranted intrusion into these employees' privacy. Balancing the minimal public interest in disclosure against the significant privacy interest, each court found that this information was exempt from release.

Environmental Law

Contractor Must Reimburse Agency for State Environmental Fines

The contract in *C n' R Industries of Jacksonville, Inc.*[685] required the contractor to remove asbestos. After

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[675] United States v. California, 932 F.2d 1346 (9th Cir. 1991).

[676] Comp. Gen. Dec. B-242819.4, Oct. 9, 1991, 91-2 CPD ¶ 321 (recons.).

[677] 5 U.S.C. § 552 (1988).

[678] The GAO document access rules appear at 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.3(d)).

[679] 4 C.F.R. § 21.2(a)(2) (1991).

[680] 729 F.2d 81 (2d Cir. 1991).

[681] 5 U.S.C. § 552(b)(5) (1988).

[682] *Id.* § 552(b)(6).

[683] 936 F.2d 1300 (D.C. Cir. 1991).

[684] 929 F.2d 81 (2d Cir. 1991).

[685] ASBCA No. 42,209, 91-2 BCA ¶ 23,970.

performance, C n' R Industries' subcontractor certified that the work site was asbestos-free. State environmental authorities, however, later found excessive asbestos levels there. Consequently, the state assessed a fine against the subcontractor and the federal government, which the United States ultimately paid under a consent agreement. The contracting officer then initiated a claim for reimbursement against the contractor. The contractor appealed. The ASBCA held that the contract's standard permits and responsibilities clause[686] required the contractor to comply with all federal, state, and local regulations. Under this clause, the contractor remained liable for all costs that the federal government incurred because of the subcontractor's failure to comply with state asbestos standards.

In *Inman & Associates, Inc.*,[687] the government required a contractor to clean up polychlorinated biphenyls (PCBs) that it spilled when it dropped electrical capacitors. The contractor claimed for the additional costs it had incurred when it had to meet spill cleanup level mandated by state policy, instead of a less stringent federal Environmental Protection Agency (EPA) standard that the government had incorporated into the contract.[688] The Board denied recovery because the EPA level that the contractor had cited did not apply to spill cleanups and because the contract expressly had required the contractor to perform all work in accordance with federal, state, and local hazardous waste regulations. The Board also held that the long-standing state environmental policy, although not actually a regulation, had the full force and effect of law.

Government Liability for Civil Penalties

In *Ohio v. Department of Energy*[689] the Sixth Circuit upheld the imposition of state civil penalties on a federal agency for violations of the Clean Water Act (CWA)[690] and the Resource Conservation and Recovery Act (RCRA).[691] In reaching its decision, the court found that Congress had waived sovereign immunity under both acts. The Department of Energy appealed the decision and the Supreme Court granted certiorari. The Court shall consider whether a state may assess penalties against federal agencies that violate either act.

Federal Facility Compliance Act of 1991

Although the Supreme Court has granted certiorari in *Ohio v. Department of Energy*,[692] Congress may render moot the general issue of sovereign immunity if it passes its Federal Facility Compliance bill.[693] If enacted, this bill not only would require federal facilities to meet federal and state environmental laws, but also would waive federal sovereign immunity to permit states to impose civil penalties on federal agencies for environmental violations.

Standards of Conduct and Conflicts of Interest

Conduct of Competing Contractors

Improper Conduct Between Competitors

In *Huynh Service Co.*[694] an awardee protested the Navy's convenience termination of its contract. The Navy terminated the contract when it discovered an improper relationship between an employee of one competitor and the owner of the awardee. The husband of the owner of Huynh Service Company, the awardee, was employed by the second low bidder. He participated substantially in preparing and submitting the second low bid. The bid submitted by his wife's company was only slightly lower than his employer's, which suggested that the husband improperly disclosed his employer's bid to his wife. After a disappointed bidder protested to the GAO, the agency investigated and terminated the contract for convenience. The GAO found the Navy reasonably decided to protect the integrity of the procurement process by terminating the contract because the low bidder had gained an unfair advantage through improper means.[695]

Contingency Fees

In *Holmes & Narver Services, Inc.*,[696] a bidder protested that two of its competitors had enjoyed an

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[686] FAR 52.236-7.

[687] ASBCA No. 37,869, 91-3 BCA ¶ 24,048.

[688] The applicable EPA regulation, 40 C.F.R. § 761 (1991), sets a PCB cleanup level of 25 parts per million. The state cleanup level was one part per million.

[689] 904 F.2d 1058 (6th Cir. 1990), *cert. granted*, 111 S. Ct. 2256 (1991); *accord* Sierra Club v. Lujan, 931 F.2d 1421 (10th Cir. 1991).

[690] 33 U.S.C. §§ 1251-1386, *amended by* Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1323 (a)(2)(c) (1988).

[691] 42 U.S.C. § 6961 (1988); *see* Mitzelfelt v. Department of the Air Force, 903 F.2d 1293 (10th Cir. 1990) (holding that Resource Conservation and Recovery Act does not waive federal sovereign immunity for civil penalties).

[692] 904 F.2d 1058 (6th Cir. 1990), *cert. granted*, 111 S. Ct. 2256 (1991).

[693] H.R. 2194, 102d Cong., 1st Sess. (1991). *See generally* Environmental Law Note, *Waiver of Sovereign Immunity Under RCRA: Evolving Controversy*, The Army Lawyer, Sept. 1991, at 44.

[694] Comp. Gen. Dec. B-242297.2, June 12, 1991, 91-1 CPD ¶ 562.

[695] The GAO noted that its bid protest procedures, codified at 4 C.F.R. part 21, do not permit it to review contract administration matters, such as decisions to terminate for convenience. *Id.* The GAO, however, will review the reasonableness of a contracting officer's decision to terminate a contract because the original award was improper. *Id.*

[696] Comp. Gen. Dec. B-242240, Apr. 15, 1991, 91-1 CPD ¶ 373.

improper and unfair advantage because they had obtained information from the incumbent contractor in violation of 10 U.S.C. § 2306(b).[697] The protester alleged that the agreement to purchase information was a prohibited contingency fee arrangement. Apparently, the incumbent contractor had offered to sell access to its employees and certain contract information to competing firms in exchange for the promise of each to purchase the incumbent's inventory at cost and its equipment at fair market value if it won the contract. The GAO concluded that this arrangement did not violate the statute because the competing firms had not agreed to pay the incumbent "to solicit or [to] obtain" the contract on behalf of a competing offeror. Likewise, the GAO found no evidence to indicate that the incumbent had agreed to intercede with government employees responsible for awarding the contract.[698]

Conduct of Present and Former Government Employees

Present Employees

The GSBCA recently reviewed an allegation that the chairman of a source selection evaluation board (SSEB) was party to an improper relationship with the employee of a competing contractor.[699] The SSEB chairman and the awardee's planning director were friends. They frequently met socially during the procurement. The GSBCA concluded that this relationship created an appearance of impropriety that violated DOD[700] and agency[701] regulations and tainted the procurement. These violations, however, did not mandate overturning the award. In this protest, the GSBCA reviewed the procurement with "heightened scrutiny," but determined that the relationship actually had not affected the SSEB's selection of the winning contractor.

Former Government Employees

In *Robert E. Derecktor of Rhode Island, Inc. v. United States*[702] the protester claimed that the agency's award of a contract had violated the Ethics in Government Act.[703] It claimed that a former government employee had made a prohibited appearance by physically delivering the awardee's proposal to the agency. Before he retired, the former employee had been the deputy program manager and the special assistant to the program manager for the contract. The protester maintained that, under applicable regulations,[704] "physical presence alone constitutes an appearance." The District Court for the District of Rhode Island disagreed, holding that to violate the statute, the former employee would have to appear in a professional—that is, representational—capacity. Moreover, the court concluded that the former employee had conveyed only scientific and technical information—a form of communications specifically exempted from the Act's prohibition.[705] Because the former employee had served only as a messenger, he did not violate the Ethics in Government Act.

In *United States v. Schaltenbrand*[706] the Eleventh Circuit reconsidered its earlier decision in the same case. In its first decision, the court had held that a former Reserve officer's mere presence on behalf of a contractor at a "status conference" had violated 18 U.S.C. § 207(a).[707] In upholding the former officer's conviction, the court had ruled that, even if Schaltenbrand technically had not been an agent of the contractor, he had violated the statute by "otherwise representing" the contractor. On petition for rehearing, Schaltenbrand argued that the court had overlooked the language in the indictment, which alleged only that Schaltenbrand had acted as an agent for the contractor. The indictment did *not* allege that he otherwise had represented the contractor. The court agreed with Schaltenbrand, holding that he could be convicted only if he had acted as the contractor's agent at the status conference. Because Schaltenbrand had no authority to bind the contractor, the court concluded that he was not an agent and reversed that portion of his conviction. The

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[697] 10 U.S.C. § 2306(b) requires contractors to certify that they have not paid or promised to pay a commission, percentage, brokerage, or contingent fee to any person to solicit or obtain the contract. Bona fide employees and established commercial or selling agencies maintained by the contractor to obtain business are excluded. 10 U.S.C. § 2306(b) (1988).

[698] *See also* Comp. Gen. Dec. B-244302, Sept. 17, 1991, 91-2 CPD ¶ 255 (agreement under which agent's fee was contingent upon contractor receiving award, but in which agent did not offer or perform services involving any contact with government before award, did not fall within contingency fee prohibition).

[699] TRW, Inc., GSBCA No. 11,309-P.

[700] Dep't of Defense Directive 5507.7, Standards of Conduct (May 6, 1987).

[701] Air Force Reg. 70-30.

[702] 762 F. Supp. 1019 (D.R.I. 1991).

[703] *See* 18 U.S.C.A. § 207(a)(2) (West Supp. 1991) (formerly 18 U.S.C. § 207(b) until reorganized in 1989). Section 207(a)(2) prohibits former government employees from representing any other person by appearing before any department of the United States, or any of its officers, regarding any matter that was within the former employee's official responsibility as a federal employee. The prohibition applies only to representation in matters actually pending within a period of one year prior to termination of the former employee's responsibility, *see* 18 U.S.C.A. § 207(b)(1) (West Supp. 1991), and continues for two years after employment has ceased. *Id.* § 207(a).

[704] 5 C.F.R. § 737.5(b)(3) (1990) (appearance occurs when individual is physically present before the United States in a formal or informal setting, or conveys material to the United States in connection with a formal proceeding).

[705] 18 U.S.C.A. § 207(j)(5) (West Supp. 1991) (codified as 18 U.S.C. § 207(f) before amendment and reorganization in 1989).

[706] 930 F.2d 1554 (11th Cir. 1991), *vacating in part* 922 F.2d 1565, *cert. denied*, 60 U.S.L.W. 3418 (U.S. Dec. 12, 1991).

[707] 18 U.S.C.A. § 207(a)(1) (West Supp. 1991). This provision prohibits former government employees from representing any person, except the United States, at an appearance before any department of the United States. *Id.* It also prohibits former government employees from making any oral or written communications on behalf of any other persons to any department of the United States with the intent to influence federal officials. *See id.* For the provision to apply, the appearances or communications must relate to a particular matter in which the former employee participated personally and substantially while employed by the federal government. *Id.* § 207(a)(1)(B). The prohibition binds former government employees forever.

court, however, did reaffirm Schaltenbrand's conviction for unlawfully negotiating for employment with the contractor while acting for the Air Force on the project in question.[708]

Procurement Integrity

The suspension of various special postemployment restrictions, including those contained in section 27(f) of the Office of Federal Procurement Policy Act,[709] expired May 31, 1991.[710] Federal lawmakers failed to enact legislative proposals to revise the prohibitions in the first session of the 102d Congress.

Proposed Government-Wide Ethics Regulations for Federal Employees

The Office of Government Ethics (OGE) has proposed the consolidation and revision of agency standards of conduct regulations.[711] Among the many changes the OGE has recommended, the proposed regulation would prohibit employees from knowingly making unauthorized commitments or promises of any kind that would purport to bind the government. An employee that acts in good faith and without knowledge that he or she is exceeding the scope of his or her official authority, however, will not violate the proposed regulation. Other notable features include the adoption of a de minimis exception to the gratuities prohibition, which would allow employees to accept unsolicited gifts having an aggregate market value of twenty-five dollars or less per occasion and a combined value of no more than $100 from any single source in a calendar year.[712] The proposed regulation also would permit government employees to accept, on infrequent occasions, food and refreshments offered during luncheon or dinner meetings.

Government employees would have to disqualify themselves from participation in matters that directly and predictably would affect the financial interests of persons with whom they are "negotiating[,] or ha[ve] any arrangement concerning[,] prospective employment." The proposed rule broadly defines "negotiating" as any discussion or communication with another person, or with this person's agent, mutually conducted with a view toward reaching an agreement about possible employment with that person. Notably, the rule does not limit negotiation to the discussion of specific terms and conditions of employment for a specific position. These rules, if adopted, will modify existing agency practices significantly.

Organizational Conflicts of Interest

In *Ressler Associates, Inc.*,[713] the agency excluded a contractor from competition for an engineering services contract because of an organizational conflict of interest.[714] The agency did so because the protester had drafted portions of the specifications, giving it an unfair competitive advantage. The protester argued that its activities in drafting the specifications were within the exemption for system development and design work.[715] The GAO found the exemption inapplicable, remarking that the exemption "contemplates the situation where a firm wishes to compete for a contract for a system or service based on that firm's earlier development and design work." The protested acquisition was for more development and design services—not further development of the system. Accordingly, the GAO upheld the agency's action as proper and reasonable.

In *Lawlor Corp.*[716] the protester challenged a contracting officer's decision to waive an organizational conflict of interest. The low bidder on a construction contract was affiliated with a firm that had designed approximately twenty-five percent of the construction project. The FAR forbids federal agencies from awarding construction contracts to builders that are affiliated with the architect-engineering firms that designed the construction projects.[717] In the present case, however, the contractor had requested and had received a waiver to this provision. The agency had concluded that, because two independent firms had designed the project and would supervise its construction, any potential bias or competitive advantage inherent to awarding the contract to the affiliated firm would be minimal. On appeal, the GAO agreed and upheld the award.

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[708] 18 U.S.C.A § 208(a) (West Supp. 1991) (prohibiting government employees from acting on matters that affect their financial interests).

[709] 41 U.S.C.A. § 423(f) (West Supp. 1991).

[710] *See* National Defense Authorization for 1991, Pub. L. No. 101-510, § 815, 104 Stat. 1485, 1597 (1990).

[711] 56 Fed. Reg. 33,776 (1991).

[712] The proposed regulation does not affect the procurement integrity prohibitions applicable to procurement officials. *See* FAR 3.104-4(f)(1).

[713] Comp. Gen. Dec. B-244110, Sept. 9, 1991, 91-2 CPD ¶ 230.

[714] Organizational conflicts of interest exist when one contractor gains an unfair advantage in competing for other contracts because of the work it has performed on its current contract. A contractor also may have an organizational conflict of interest when other work may cause it to give biased advice on its current contract. *See* FAR 9.501.

[715] FAR 9.505-2(a)(3).

[716] Comp. Gen. Dec. B-241945.2, Mar. 28, 1991, 91-1 CPD ¶ 335 (recons.).

[717] *See* FAR 36.209. The head of the agency or his authorized representative may waive this provision. *Id.*

Contracting for Information Resources

GSA Issues New FIRMR

Last year we reported that the GSA had promulgated a new Federal Information Resources Management Regulation (FIRMR).[718] The regulation, which applies to all solicitations issued after April 29, 1991, is significantly shorter than its predecessor and deletes a number of existing provisions that were unique to acquisitions of automatic data processing equipment (ADPE). Significant changes are highlighted below. The GSA moved other statements of policy from the FIRMR to FIRMR Bulletins, which are not binding authority, but only guidance.[719] In essence, by issuing the new FIRMR, the GSA has streamlined the acquisition of information resources.

Uniform Regulatory DPAs

The new FIRMR greatly simplifies blanket delegations of procurement authority.[720] An agency need not seek a specific DPA when: (1) it seeks to acquire federal information processing (FIP)[721] resources competitively and the dollar value of each individual resource—for example, hardware, software, or services—does not exceed $2.5 million; (2) it seeks to acquire FIP resources by sole source procedures or by using a specific make and model specification and the dollar value of each individual resource does not exceed $250,000; or (3) it seeks to acquire FIP-related *supplies*,[722] regardless of their amount or value.[723] Telecommunications acquisitions within the scope of FTS 2000 are *not* covered by these exclusions.[724]

Multiple Award Schedule Contracts

The new FIRMR *Commerce Business Daily* (*CBD*) contains new synopsis procedures that apply when an original synopsis elicits favorable responses from sources other than the schedule contractor. When the synopsis responses indicate that the contracting officer should issue a solicitation for a requirement, FIRMR § 201-39.501(2)(b) permits the contracting officer to issue a solicitation without a second *CBD* synopsis.

Life Cycle Cost Evaluations

As amended, the FIRMR no longer requires agencies to solicit four purchase plans. Agencies seeking to obtain ADPE formerly had to solicit a plan to purchase, a plan to lease, a plan to lease to ownership, and a plan to lease with option to purchase. Instead, the FIRMR lists specific cost evaluation factors that agencies must include in their requests for proposals.[725] These factors include: (1) all basic and option prices; (2) in-house costs of installing, operating, and disposing of the FIP resources, if these costs are quantifiable and differ from offer to offer; (3) conversion costs; and (4) present value analysis, using Office of Management and Budget Circular A-104, if the agencies expect the timing of payments will differ.

In *Storage Technology Corp.*[726] the agency did not include an option for an upgrade. The protester alleged that this was inconsistent with the specification that required an upgrade capability, and thus violated the FIRMR. The GSBCA held that the agency need not include an upgrade option when doing so might distort the life cycle cost.

Which Acquisitions Involve Federal Information Processing Resources?

The GSBCA relies on guidance in FIRMR Bulletins to determine whether a particular acquisition is subject to the Brooks Act. In *ST Systems Corp.*[727] the GSBCA resorted to a decision diagram in FIRMR Bulletin 67[728] as the test for applicability of the Brooks Act and the significant use exception. It concluded that a contract for a data reduction requirement was for FIP resources, not for services, without even discussing whether the agency's use of FIP resources would be substantial. Following the decision diagram closely may lead one to conclude that many acquisitions are subject to the FIRMR.

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[718] 55 Fed. Reg. 53,386 (1990) (revised rule effective Apr. 29, 1991, codified at 41 C.F.R. ch. 201); *see* FAC 90-5, 56 Fed. Reg. 29,130 (1991) (adding part 201-39 as appendix A, FAR pt. 39, effective July 25, 1991).

[719] *See* Fed. Info. Resources Management Reg. 201-20.304(b)(2) (1990) [hereinafter FIRMR].

[720] FIRMR § 201-20.305(a)(1).

[721] The new FIRMR uses the term "federal information processing (FIP) resources" instead of "automatic data processing equipment" (ADPE) to describe goods and services that are subject to the Brooks Act, 40 U.S.C. § 759 (1988). *See* FIRMR § 201-4.001. We use the terms interchangeably.

[722] Typical FIP-related supplies include paper, printer ribbons, and floppy disks.

[723] FIRMR § 201-20.305(a)(2).

[724] *Id.* § 201-20.305-1(a)(1)(i).

[725] *Id.* § 201-39.1501-1.

[726] GSBCA No. 11,306-P, 91-3 BCA ¶ 24,253.

[727] GSBCA No. 11,207-P, 91-3 BCA ¶ 24,201.

[728] FIRMR Bulletin A-1, dated January 31, 1991, replaces FIRMR Bulletin 67, which was cited in the *ST Systems* decision. *See* Liebert Corp., GSBCA No. 11,300-P, 1991 BPD ¶ 196 (citing with approval FIRMR Bulletin A-1).

A number of other protest decisions in the past year have wrestled with the definition of FIP resources. In *Merrimac Management Institute, Inc.*,[729] the Navy sought to train managers to use existing computer generated reports. The GSBCA held that the training was neither FIP services, nor a services acquisition that made significant use of FIP resources. In *Liebert Corp.*[730] the Board held that a backup power supply is not a FIP resource, even if it contained microprocessors for monitoring its operation and the agency had acquired it specifically to power computer equipment. *Corporate Jets, Inc.*[731] involved a solicitation for the maintenance and operation of a fleet of aircraft. The statement of work for this solicitation required the contractor to establish a computer database for maintenance records. Noting that ADPE had merited its own section in the scope of work and that the solicitation's evaluation factors expressly covered ADPE, the GSBCA held that the use of ADPE for this requirement was significant. No 1991 decision directly addressed the FIRMR's two-part test[732] for determining whether a contract for a non-ADPE product or service makes a significant use of FIP resources.

FIRMR Exclusions

A number of GSBCA and Federal Circuit cases have addressed the scope of the various Brooks Act exclusions. The most significant development in this area, however, was the new exclusion that the GSA created for the revised FIRMR.[733] The FIRMR now excludes FIP resources that are embedded in a product, if the product's principal function is not information processing and the resources: (1) cannot be used for other purposes without substantial modification; *or* (2) cost less than $500,000 or twenty percent of the product's total value, whichever is less. This new exclusion extends the concept of embedded ADPE to civilian agencies.

In *Bulloch International, Inc.*,[734] the GSBCA held that a T-1 satellite communications circuit was not a radio, but a transmission of information. Accordingly, the Board concluded that the circuit was outside the scope of the radio, television, radar, and sonar exception of the Brooks Act.

Two notable decisions addressed the Warner Amendment exclusions. Although the GSBCA traditionally defers to agencies' judgments on intelligence exclusions, it has held that the mere use of a phone system by an intelligence agency does not exclude the entire system. In *Contel Federal Systems, Inc.*,[735] the GSBCA, citing Defense Department guidance, held that the Fort Belvoir telecommunications upgrade was not covered by the Warner Amendment because it did not relate *primarily* to intelligence or to the command and control of military forces. In *Information Systems & Networks Corp.*[736] the Board found that computer-operated intrusion detection systems were critical to the direct fulfillment of a military mission—that is, safeguarding lives and property. The Board appears to have been influenced heavily by its findings that the system had been congressionally mandated for use on bases overseas and that it would be used to counter specific terrorist threats.

An agency should consider including the clause styled "*FIRMR Applicability*," which appears in the October, 1989, FIRMR, in solicitations if it considers the acquisition to be excluded from the FIRMR.[737] This should prompt interested parties to resolve close questions of FIRMR applicability early in the acquisition process.

Subcontracts

The GSBCA previously has held that the Brooks Act covers ADPE subcontracts that certain prime contractors have awarded "by or for the government."[738] In *US West Communications Services, Inc. v. United States*[739] the Federal Circuit extensively analyzed the legislative history of the Brooks Act. It determined that the Act applied only to *prime* contract awards by *federal contracting officers*. The court carefully distinguished a line of GAO decisions that had permitted protests against sub-

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[729] GSBCA No. 11,139-P, 91-2 BCA ¶ 23,962.

[730] GSBCA No. 11,300-P, 1991 BPD ¶ 196.

[731] GSBCA No. 11,049-P, 91-2 BCA ¶ 23,765, *protest denied*, 91-2 BCA ¶ 23,998.

[732] *See* FIRMR 201-1.002-1(b)(3); FIRMR 201-39.101-3(b)(5). A non-ADPE contract makes a significant use of ADPE if: (1) the product or service reasonably cannot be produced or performed without ADPE; and (2) the dollar value of the ADPE is less than the lesser of $500,000 or 20% of the contract price.

[733] FIRMR 201-1.002-2(e); *id.* 201-39.101-3(b)(5).

[734] GSBCA No. 10,977-P, 91-2 BCA ¶ 23,737.

[735] GSBCA No. 11,060-P, 91-2 BCA ¶ 23,764.

[736] GSBCA No. 10,775-P, 91-1 BCA ¶ 23,354, *aff'd*, 946 F.2d 876 (Fed. Cir. 1991).

[737] FIRMR § 201-39.101-3(c).

[738] *See* 3D Computer Corp., GSBCA No. 9962-P, 89-2 BCA ¶ 21,826 (Brooks Act covered systems integrator's order on nonmandatory federal supply schedule); United Tel. Co. of the Northwest, GSBCA No. 10,031-P, 89-3 BCA ¶ 22,108 (Brooks Act covered Department of Energy management and operating contractor subcontract); International Technology Corp., GSBCA No. 10,369, 90-1 BCA ¶ 22,582 (Brooks Act covered systems integrator's subcontract).

[739] 940 F.2d 622 (Fed. Cir. 1991).

contract awards "by or for the government." It noted that the GAO had based these decisions on the GAO's separate, pre-CICA statutory authority to settle accounts. Following the court's decision in this case, awards by prime contractors are not subject to the FIRMR, and disappointed subcontractors may not protest to the GSBCA.[740]

Fiscal Law

Purpose

The past few years have seen an increase in the number of Comptroller General opinions that allow agencies to use appropriated funds for purposes that, at first blush, would appear to be personal. The decisions we reviewed this year reflect that trend.

GAO Approves Use of Appropriated Funds for Health Club Membership Dues

The Comptroller General upheld as proper a federal agency's expenditure of appropriated funds to purchase health facility memberships for its employees.[741] The Comptroller General reasoned that these expenses were related reasonably to the agency's statutory authority to establish preventive health programs that promote and maintain the physical and mental fitness of federal employees.[742] He cautioned, however, that an expenditure of this nature is proper "only where all other resources have been considered and rejected, and where employee use of the program will be carefully monitored as part of a bona fide preventive program relating to health."

Agency May Lease New Space for Day Care Facility

The Comptroller General opined that the GSA lawfully could lease space or construct buildings for child care facilities if the GSA lacked sufficient space in its existing real property inventory for these facilities.[743] Congress has authorized agencies to provide space in federal buildings for child care facilities if "such space is available."[744] General Services Administration officials maintained that the GSA has very little vacant space available in many of its facilities that need child care centers. On review, the Comptroller General first noted that Congress clearly wanted federal agencies to establish day care facilities. Very few agencies, however, have "available" space; therefore, a restrictive reading of the statute effectively would preclude the GSA from providing space for child care and would defeat the purpose of the statute. Accordingly, the Comptroller General found that the GSA could expend appropriated funds to further the purpose of the child care facility statute.

Agency May Expend Appropriated Funds to Encourage Fishermen to Return Research Tags

The GAO ruled that using appropriated funds to provide prizes for returned fish tags was reasonably necessary to enable an agency to achieve an authorized purpose.[745] The National Oceanic and Atmospheric Administration (NOAA) continually monitors the life-cycles of many species of fishes to support fishery conservation and management. To facilitate its research, the agency issues fish tags imprinted with questions about the circumstances under which the fish was caught, the agency's return address, and the word "reward." When a fisherman completes and returns a fish tag to NOAA, NOAA gains information that assists its research efforts and the fisherman receives a five dollar reward from NOAA. To further encourage the return of the fish tags, NOAA proposed conducting an annual drawing from the returned tags for a limited number of large cash prizes. Because the prizes that NOAA proposed to award through the drawing were reasonably necessary to NOAA's authorized research purpose, GAO found that the use of appropriated funds was proper.

IRS May Use Appropriated Funds to Allow Employees to File Their Tax Returns Electronically

The IRS proposed to establish a program that would enable IRS employees to file their tax returns electronically, free of charge, as a necessary expense under its appropriation for "processing tax returns." The IRS asserted that the program would reduce government expenses, both in the processing of returns and in the training of employees. Moreover, the program would allow the IRS to demonstrate the feasibility and accuracy of the new technology, thereby promoting corporate sponsorship of employee electronic filing systems and encouraging the public to accept a new mechanism for filing returns. Although the GAO normally would consider the cost of electronically filing a return to be a personal expense of the employee, the GAO opined that, in this case, appropriated funds were available for these

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[740] If the court's rationale is correct, the GAO may lack the authority to recommend award of attorneys' fees in subcontractor bid protests because it does not review these protests under CICA.

[741] 70 Comp. Gen. 190 (1991).

[742] 5 U.S.C. § 7901 (1988).

[743] 70 Comp. Gen. 210 (1991).

[744] 40 U.S.C. § 490b (1988).

[745] Ms. Comp. Gen. B-242391, Sept. 27, 1991.

expenditures because the expenditures primarily benefited the government.[746] The GAO approved the expansion of the electronic filing program to all IRS employees because it was part of the agency's promotion of new technologies for enhancing effective and efficient tax collection and return processing.

DEA May Use Appropriated Funds to Enclose Administrator's Carport

In *Drug Enforcement Administration—Permanent Improvements to Leased Property*,[747] the GAO approved the Drug Enforcement Administration's (DEA) use of appropriated funds to enclose and secure a carport at the DEA Administrator's residence in response to a legitimate concern for his safety. Generally, agencies may not use appropriated funds to improve private property. An agency may expend appropriated funds for these improvements, however, if: (1) the proposed alterations are incidental to, and essential for, the accomplishment of the purpose of the appropriation; (2) the costs of the alterations are reasonable; (3) the improvements principally benefit the government; and (4) the government's interest in the improvements is protected. Noting that various unknown individuals had threatened the health and safety of the Administrator of the DEA, that these threats easily could be executed at the Administrator's home, and that the DEA's security office had determined that enclosing the carport was necessary to meet security standards, the GAO found that the agency could expend appropriated funds to secure the carport.

Payment of Conference Attendee Costs at Statutorily-Mandated Conference Is Authorized

In *Commission on Interstate Child Support—Payment of Lodging and Meal Expenses of Certain Attendees at the National Conference on Interstate Child Support*,[748] the GAO allowed the Commission on Interstate Child Support to pay the expenses of attendees whose presence at the conference was essential to the Commission's duties. The GAO observed that a federal statute requires the Commission to hold national conferences to gather information and to recommend to Congress ways to improve the interstate support enforcement system. The statute also authorizes the Commission to spend appropriated funds for these conferences. Accordingly, the GAO opined that the expenditure of appropriated funds for certain attendees also was proper if the Commission determined that payment was essential to assist the Commission in its statutory duties and to ensure adequate representation at the conference.

IRS May Not Buy T-Shirts for Employees Who Contribute to Combined Federal Campaign

The IRS proposed to purchase T-shirts for employees who contributed five dollars or more each pay period to the Combined Federal Campaign (CFC). The GAO, however, declared that purchase of the shirts was not a proper use of appropriated funds.[749] It acknowledged that CFC is a sanctioned charity, to which federal agencies may lend their support. It also noted that agencies may use appropriated funds if reasonably necessary to demonstrate campaign support. The GAO did not agree, however, that purchasing T-shirts to reward generous contributors to the CFC was a necessary expense to that end.

Fees Collected for Training May Be Credited to Agency's Appropriation

Financial Management Services (FMS) offers financial management seminars to both federal program managers and nonfederal participants. Financial Management Services employees run the seminars and are paid from FMS appropriations. Financial Management Services charges a fee for the seminars and, until recently, deposited all the money it collected from the attendees into the United States Treasury as miscellaneous receipts.

Last year, however, FMS proposed to deposit the fees into its own appropriation under the authority of the Economy Act.[750] Reviewing this proposal,[751] the GAO found that the Government Employees Training Act (GETA),[752] not the Economy Act, applied because the GETA confers on agencies the specific authority to train federal, state, and local employees and to collect and retain training fees. Accordingly, the GAO opined that FMS may credit its account with the fees it received from federal agency participants under the authority of the GETA, but held that FMS must deposit fees from all *other* participants into the miscellaneous receipts account.

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[746] Ms. Comp. Gen. B-239510, Oct. 17, 1991.

[747] Ms. Comp. Gen. B-243866.1, Oct. 3, 1991.

[748] Ms. Comp. Gen. B-242880, Mar. 27, 1991 (unpub.).

[749] Ms. Comp. Gen. B-240001, Feb. 8, 1991.

[750] 31 U.S.C. § 1535 (1988).

[751] Ms. Comp. Gen. B-241269, Feb. 28, 1991 (unpub.).

[752] 42 U.S.C. § 4742(c) (1988).

Obligations

Army Regulation 37-1[753]

Newly published Army Regulation (AR) 37-1 supercedes twenty Army regulations from the 37- and 735-series. It also rescinds twenty-two Department of Army forms and optional forms. Consequently, persons working in Army accounting and fund control should not presume the continued validity of rules that may have been valid in the past. Although the changes contained in the new regulation are too numerous to identify in this note, the new policy concerning commitment accounting is particularly significant and worthy of review.

As amended, AR 37-1 includes new commitment accounting requirements for fund managers. Army regulations formerly required commitment accounting for military construction; for research, development, and testing; and for procurement appropriations; but not for operation and maintenance appropriations (O&MA). The current regulation, however, mandates commitment accounting for *all* appropriations except for merged appropriations.[754] Because O&MA purchases comprise a relatively large number of procurements, this additional requirement may increase the workload of fund managers substantially.

Tables 9-1 through 9-10 of AR 37-1 summarize the rules currently governing the obligation of funds. Fund managers and attorney-advisors should refer to these tables to determine the amounts and types of funds that should be obligated under different circumstances, such as the awarding of a firm fixed-price, letter, or requirements contract; or when making certain types of payments, such as temporary duty payments, purchase orders, or claims settlements. Users of the regulation must remember, however, that other directives may modify or supercede the regulation. For example, one recent change—described below—extensively modified the procedures for funding reprocurement contracts following a termination for default.

New Policy on Funding Reprocurement Contracts Announced

As published, AR 37-1, paragraph 9-5(e) and table 9-9, state that if a contract is terminated for default, fund managers should "obligate the funds cited on the original contract to hire another to complete the unfinished work."[755] The Office of the Deputy Comptroller for the Department of Defense, however, has changed that rule.[756] Citing previous Defense Department guidance on the use of expired funds, the DOD Deputy Comptroller for Management Systems directed that "unused funds from an expired account may not be used to fund reprocurement actions." Rather, "such contracts should be funded with current year appropriations."[757] This directive applies to the Army, the Navy, the Air Force, Defense agencies, and Washington Headquarters Services. It results from the Deputy Comptroller's determination that contract changes include not only in-scope changes, but also other changes that result in contractor billable costs, such as reprocurement actions. This policy requires DOD agencies to use current year funds for contract reprocurement actions even if original year funds otherwise might be available. This policy contradicts AR 37-1, as well as a long line of Comptroller General decisions[758] that appear to authorize the use of prior year funds.

DOD Revised Guidance for Expired Accounts

As reported last year, Congress abolished the Merged and Merged Surplus Account, effective December 5, 1990, and directed that the "M" Account be phased out over the next three years.[759] Since then, the Defense Department Comptroller has issued revised guidance, summarized below, on accounting for expired accounts, including "M" and Merged Surplus Accounts.[760]

The law eliminates most differences between the treatments of obligated and unobligated balances of appropriations following the expiration of their periods of availability for obligation. It establishes new procedures for liquidating obligations after their periods of availability for obligation and restricts the period during which obligations may be paid from expired accounts. Among the significant implementing provisions are the following:

> (a) For five years after an appropriation expires, an agency may use both obligated and unobligated balances of an appropriation to record, to adjust, or to liquidate obligations properly chargeable to that account;

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[753] Army Reg. 37-1, Army Accounting and Fund Control (30 Apr. 1991) [hereinafter AR 37-1].

[754] *Id.*, para. 8-1(c).

[755] *Id.*, tbl. 9-9, No. 6.

[756] *See generally* TJAGSA Practice Note, *Fiscal Law Update: Funding Reprocurement Contracts*, The Army Lawyer, Dec. 1991, at 39.

[757] Memorandum, Deputy Comptroller (Management Systems), Department of Defense, subject: Contract Defaults Resulting in Reprocurement Contract Actions, Aug. 12, 1991, *reprinted in* TJAGSA Practice Note, *supra* note 756, at 39 n.25.

[758] *See, e.g.*, 60 Comp. Gen. 591 (1981); 40 Comp. Gen. 590 (1961).

[759] National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 1405 (1990) (codified at 31 U.S.C. §§ 1551-1558).

[760] Memorandum, Principal Deputy Comptroller, Department of Defense, subject: Revised DOD Guidance on Accounting for Expired Accounts, including "M" and Merged Surplus Accounts, June 13, 1991.

(b) An agency generally shall cancel an appropriation five years after the appropriation expires. If an agency must record or adjust a canceled appropriation, it shall charge the obligation to an appropriation currently available for the same purpose. The law does limit the use of current appropriations for adjusting obligations, however, and agencies must report to Congress any use of current appropriations for this purpose.

(c) Unobligated balances and unpaid obligations that involve expired appropriations must be identified until they are canceled.

(d) No new "M" accounts may be established and existing "M" accounts must be phased out.

(e) After March 6, 1991, agencies no longer may make payments from canceled "M" accounts.

(f) Most contract changes that have been redefined to include in-scope and other changes which result in additional contractor billable costs must be funded with current appropriations.

(g) Agencies may need to maintain additional accounting controls to avoid violations of the Anti-Deficiency Act that otherwise might result from the changed rules.

In sum, this law substantially changes the rules to which many contract law practitioners have become accustomed. By strictly limiting the purposes for which agencies may use expired appropriations, it transfers control of expired funds to Congress, while increasing an agency's duty to monitor and identify those funds.

Anti-Deficiency Act

Omission of Availability of Funds Clause Triggered Anti-Deficiency Act Violation

At the end of FY 1984, the Forest Service awarded a contract for janitorial services to be performed in FY 1985. The contract cited FY 1985 funds, but the contracting officer omitted a clause that would have conditioned the government's legal liability on the availability of FY 1985 funds.[761] The GAO found that awarding the contract without an availability of funds clause violated 31 U.S.C. § 1341(b) because the contracting officer obligated FY 1985 funds unconditionally before Congress appropriated them.[762] Noting, however, that this was a stale "technical violation," the GAO did not recommend that the agency report it to Congress.

Advance of Funds to Cashiers Did Not Violate the Anti-Deficiency Act

Responding to a letter from the Department of Veterans' Affairs, the Comptroller General held that an advance of funds to imprest cashiers was not an obligation and, therefore, did not cause an antideficiency violation.[763] The Comptroller General warned, however, that although an advance might not entail a legal liability, a violation could occur if the agency expended its appropriation and the cashier later obligated the advanced funds. The Comptroller General recommended that agencies formally reserve imprest funds against their appropriations to avoid antideficiency violations.

Home-to-Work Statute Does Not Apply to Temporary Duty Travel

Noting that he would no longer follow an earlier contrary opinion,[764] the Comptroller General held that federal employees in a temporary duty status may use government vehicles to travel between their homes and common-carrier terminals.[765] The Comptroller General reviewed the legislative history of the "home-to-work" statute and found that Congress intended this statute merely to prohibit travel between an employee's home and place of business.[766] The Comptroller General also recommended that the government amend the Federal Travel Regulations[767] to provide guidance in accordance with his opinion.

Intragovernmental Acquisitions

GAO Reviews First Protest Involving Economy Act

Liebert Corp.[768] involved an Economy Act[769] transaction between the Federal Aviation Administration (FAA) and the Air Force. Under the agreement, the Air Force ordered items from one of its requirements contracts to meet the needs of the FAA. Liebert contended that supply schedule prices were lower than the Air Force prices and that the FAA could not have found it more economical to order through the Air Force. The GAO rejected this argu-

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[761] *See* FAR 52.232-18.

[762] Ms. Comp. Gen. B-235086, Apr. 24, 1991 (unpub.). The GAO declined to read the availability of funds clause into the contract under the "*Christian* Doctrine." *See G.L. Christian & Assoc. v. United States*, 312 F.2d 418 (Ct. Cl.), *cert. denied*, 375 U.S. 954 (1963).

[763] Ms. Comp. Gen. B-240238, May 8, 1991.

[764] Ms. Comp. Gen. B-210555.23, May 18, 1987 (unpub.).

[765] Ms. Comp. Gen. B-210555.44, Jan. 22, 1991.

[766] *See* 31 U.S.C. § 1344 (1988) (prohibiting use of funds to maintain or operate passenger carrier except to extent carrier is used for official purposes).

[767] *See* 41 C.F.R. ch. 301 (1991).

[768] Comp. Gen. Dec. B-232234.5, Apr. 29, 1991, 91-1 CPD ¶ 413.

[769] 31 U.S.C. § 1535 (1988). Under this provision, one agency may obtain goods and services from another agency on a reimbursable basis.

ment, noting that Liebert's prices had not been not in effect when the agencies executed their agreement. The GAO also noted that the Economy Act generally permits one agency to order for another agency. Accordingly, competitors for requirements contracts are on notice that one agency may use such a contract to acquire goods and services from another agency. The GAO ultimately sustained the protest, however, because the FAA order had exceeded a maximum order limitation applicable to each contract line item.

Department Improperly Apportions Economy Act Costs Among Its Agencies

The Department of Labor obligated funds from the accounts of several of its agencies to finance the purchase of its executive computer network. The fund manager apportioned the cost of the system to each agency in proportion to each agency's staffing level. No relationship existed, however, between the number of employees in an agency and the cost of the computer equipment that the DOL had purchased for that agency. The GAO found that this scheme did not comport with the Economy Act because the Act authorizes acquiring agencies to charge ordering activities only the actual cost of the goods or services provided.[770] It concluded that the transaction was an unauthorized transfer of funds between appropriations.[771]

Liability of Accountable Officers

Negligence Does Not Bar Relief for Exchange Transaction Losses

In the past, the GAO has permitted an agency to adjust an accountable officer's account for accommodation exchange losses only if the officer acted reasonably and in good faith.[772] The Comptroller General, however, recently broke with that long-standing precedent. In a recent case involving the relief of an accountable officer for cashing an uncollectible check, the Comptroller General held that the statute authorizing adjustments for exchange transactions does not mandate a standard of due care or good faith.[773] The GAO concluded, however, that this statutory relief provision is only permissive. If an agency finds that an accountable officer was negligent, it still may deny the officer relief.[774]

GAO Modifies "Tainted Day" Rule

Until 1991, an accountable officer was liable personally for a full day's per diem payment if any element of a claim that he or she paid that day was tainted with fraud. The Comptroller General based his decisions on a statute that imposes an absolute bar to fraudulently asserted claims.[775] In a recent decision, however, the Comptroller General found reliance on this statute misplaced because the law applies only to unpaid claims.[776] Noting that an accountable officer is responsible only for paid fraudulent claims, the Comptroller General concluded that agencies more appropriately might fix accountable officers' liabilities in amounts that the government could recover readily from fraudulent payees—that is, the sums the payees obtained by fraud.[777]

Revolving Funds—Defense Business Operations Fund Established

The Department of Defense established the Defense Business Operations Fund (DBOF) as a revolving fund on October 1, 1991.[778] The DBOF is part of the DOD's effort to reduce duplicative costs and to improve the efficiency of its support operations.

The DOD will implement the DBOF in at least two phases. In the first phase, the DOD will establish the DBOF as a single revolving fund, under which all existing stock and industrial funds will be subsumed. Phase one began on October 1, 1991, when the Defense Department incorporated all existing industrial and stock funds,[779] the Defense Finance and Accounting Services, the Defense Commissary Agency,[780] and three small

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[770] Ms. Comp. Gen. B-238024, June 28, 1991.

[771] *See* 31 U.S.C. § 1532 (1988).

[772] *See* 61 Comp. Gen. 649 (1982); 27 Comp. Gen. 211 (1947). Accommodation exchanges are transactions such as foreign currency exchange and check cashing.

[773] Ms. 70 Comp. Gen. B-239483.2, July 8, 1991; *see also* 31 U.S.C. § 3342 (1988) (authorizing accommodation transactions and permitting agencies to use gains from check cashing or exchange transactions to offset losses from similar transactions).

[774] If an agency denies relief under 31 U.S.C. § 3342, the accountable officer may petition the GAO for relief under 31 U.S.C. § 3527(c). This statute includes a negligence standard. *See* 31 U.S.C. § 3527(c) (1988) ("the Comptroller General may relieve a present or former disbursing officer ... [if] the payment was not the result of ... lack of reasonable care").

[775] *See* 28 U.S.C. § 2514 (1988) (any person who practices fraud in the proof or establishment of a claim forfeits the claim).

[776] Ms. Comp. Gen. B-217114.7, May 6, 1991.

[777] *See* False Claims Act, 31 U.S.C. §§ 3729-3733 (1988); Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812 (1988).

[778] *See* Memorandum, Comptroller, Department of Defense, subject: Defense Business Operation Fund Financial Policy, Sept. 27, 1991. The fund is used to manage defense support activities that resemble commercial activities. *See id.*

[779] Memorandum, Principal Deputy Comptroller, Department of Defense, subject: Fiscal Year 1992 Defense Business Operations Fund (DBOF) Financial Management Guidance, Aug. 19, 1991.

[780] These activities previously were funded in the Operations and Maintenance accounts.

DLA functions[781] into the DBOF. In subsequent phases, which will begin only if the DOD successfully completes the first phase, the Defense Department intends to bring into the DBOF other activities, such as the Defense Contract Management Command, Defense Contract Audit Agency, and other operations programs that support combat forces.

In general, each DBOF stock and industrial fund activity will operate under the financial policies and responsibilities currently in effect. Because the consolidation of various activities into one revolving fund diminishes congressional oversight, Congress has asked the Defense Department to preserve the identity of each activity and to continue separate accounting, financial reporting, and auditing. Other activities will operate in accordance with guidance from the Comptroller of the Department of Defense.[782]

Much to the dissatisfaction of Congress, the DBOF will operate under capital budgeting principles. To implement these principles, the DOD will finance through the DBOF the acquisition of all capital assets—except major construction—for use by DBOF activities. The cost of each capital purchase then will be charged to the capital budget of the appropriate business area or activity.

Congress has imposed several reporting requirements on the DOD. Each quarter, the Secretary of Defense must provide a detailed DBOF financial and operations report to certain congressional committees. The first of these reports is due no later than April 1, 1992. After the close of each fiscal year, the Secretary of Defense also must submit to Congress a financial summary, similar to the summaries that corporations submit to their shareholders, that describes in detail the operations of the fund throughout the year.

The DOD Comptroller, in coordination with the military departments and defense agencies, is responsible for establishing necessary policies applicable to financial management, budget preparation, accounting, and reporting. A Defense Business Operations Fund Financial Board of Directors[783] will be established to recommend financial policies, to recommend business areas or activities for inclusion in the DBOF, and to resolve policy issues. Operations of the DBOF business areas, however, remain the responsibilities of the military departments and DOD agencies. The Defense Department is updating its policy documents to reflect the changes necessitated by the consolidation and capital budgeting.[784]

[781] Specifically, these functions were the Defense Technical Information Center, the Defense Reutilization and Marketing Services, and the Defense Industrial Plant Equipment Center.

[782] Memorandum, Comptroller, Department of Defense, subject: Defense Business Operation Fund Financial Policy, Sept. 27, 1991.

[783] The Board will be chaired by the Principal Deputy Comptroller of the DOD and will be composed of various comptroller-type representatives from the services and defense agencies.

[784] Further guidance from the Defense Department Comptroller is expected in the first quarter of 1992. Meanwhile, practitioners in this area should refer to Memorandum, Comptroller, Department of Defense, subject: Defense Business Operation Fund Financial Policy, 27 Sept. 1991.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. They also can be adapted for use as locally-published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*. Send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Consumer Law Note

Photographic Services Company in Contempt of Court—"Comply with the Law or Cancel Contracts"[1]

All too often legal assistance attorneys must deal with problems associated with photographic services contracts. After clients have signed contracts to purchase discount film and processing services—usually at exorbitant cost—they ask how to cancel the contract or resolve complaints with the company. Unfortunately, many com-

[1] The idea for this note came from material sent by Ms. Patricia Laverdure, attorney-at-law, Fort Ord, California.

panies fail to respond satisfactorily. Some do not respond at all.

The Federal Trade Commission took aggressive action in a consumer fraud case against one of these companies. It targeted Traditional Industries, Inc., (Traditional), a California corporation that also operates under the names Photomagic Industries, Photomagic Joint Ventures, United Network International, Video Keepsakes, American Industries of Oregon, AJK, Pacific Image Film Productions, Direct Sales of America, Scherling Film Club, Family Record Plan, TRICAN, and Tristar.[2]

In a consent decree entered August 18, 1989, the United States District Court for the Western District of Washington permanently enjoined Traditional from violating requirements of the Federal Trade Commission Rule governing the three-day cooling-off period for door-to-door sales,[3] the Truth in Lending Act,[4] and Regulation Z.[5] Traditional regularly had failed to furnish buyers with copies of their contracts and proper notices of their rescission rights, as required by the cooling-off rule. The court also enjoined Traditional from misrepresenting consumers' cancellation rights, failing to honor valid cancellation notices, and failing to refund all payments and to return negotiable instruments to buyers. Finally, the court enjoined the company from failing properly to disclose credit terms of the contracts, misrepresenting services offered and savings to the buyer, giving false price comparisons, and making numerous other material misrepresentations.

Traditional did not honor the consent decree. Accordingly, the district court found Traditional in contempt on January 4, 1991,[6] for failing to "bring its sales conduct into compliance with the ... Decree."[7] The court declared that all Traditional photographic contracts, into which consumers entered between August 16, 1989, and October 18, 1990, were voidable by the customers. It also ordered Traditional to hire an independent administrator, responsible both to Traditional and the Federal Trade Commission, to initiate and manage a customer redress program. The company must notify every customer affected by the order, and either must resolve each customer's complaint to the customer's satisfaction or cancel the contract at the end of thirty days, unless the customer affirms in writing his or her intent to stay bound. Traditional also must ensure that all adverse reports that it has made to credit agencies about these customers are deleted. The court imposed a fine of $10,000 per violation for each day the violation continues.

Though *Traditional Industries* involved only a limited number of contracts, the Federal Trade Commissions's action, and the court's decisions, clearly show that consumer fraud by photographic services companies will not be tolerated. Significantly, Traditional and most of its subsidiaries filed for Chapter 11 bankruptcy not long after the court entered its contempt order.[8] One only can guess at the causes of Traditional's bankruptcy, but Traditional's noncompliance with federal law and the court's initial order certainly appear to have contributed to its downfall.

Traditional's methods of operation are not unlike many to which our clients are subjected. In resolving a client's problems with a photographic services contract, a legal assistance attorney should not hesitate to discuss the Traditional case with representatives of another company. Attorneys desiring copies of the court orders should contact: Federal Trade Commission, Public Reference Branch, Room 130, 6th Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580; (202) 326-2222. Major Hostetter.

Family Law Notes

Adoption Reimbursement

Section 638 of the National Defense Authorization Act for Fiscal Years 1988 and 1989[9] created an adoption reimbursement test program. Under the test program,[10] a soldier that "initiated"[11] the adoption of a child between October 1, 1987, and September 30, 1990, could claim

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[2]Federal Trade Commission, FTC News, Jan. 8, 1991; *Federal Trade Comm'n v. Traditional Indus., Inc.*, Civil Action No. C89-1227 (W.D. Wash. Aug. 18, 1989) (consent decree).

[3]16 C.F.R. § 429.1 (1990).

[4]15 U.S.C. §§ 1601-1667e (1988).

[5]12 C.F.R. § 226 (1990).

[6]*Federal Trade Comm'n v. Traditional Indus., Inc.*, Civil Action No. C89-1227 (W.D. Wash. Jan. 4, 1991) (contempt order).

[7]*FTC News, supra* note 2.

[8]Traditional and the affected subsidiaries filed bankruptcy on March 28 and March 29, 1991.

[9]Pub. L. 100-180, § 638, 101 Stat. 1019, 1106-08 (1987).

[10]*See* National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. 101-189, § 662, 103 Stat. 1352, 1465 (1989).

[11]According to Department of Defense policy, proceedings are "initiated" when state officials conduct the home study, or when the child is placed in the adoptive home, whichever occurs later.

reimbursement for "qualifying expenses"[12] of up to $2000 per child, or $5000 per calendar year. Adoptions had to be final before the government would pay any reimbursement,[13] however, and all service members had to apply for reimbursement by 30 September 1991.

The test program expired by its own terms at the end of fiscal year 1990 and Congress did not renew it during fiscal year 1991. Section 651 of the National Defense Authorization Act for Fiscal Years 1992 and 1993, however, reinstated the test program permanently.[14] The permanent program is virtually identical to the test program, except that Congress expanded it to permit Coast Guard personnel to participate.[15]

Soldiers seeking reimbursement of qualifying adoption-related expenses should apply at their local finance offices. Legal assistance officers and their clients may obtain additional information about the program by contacting Mr. Bob Hill, Defense Finance and Accounting Service, Indianapolis Center, at DSN 699-3242 or commercial (317) 542-3242. Major Connor.

Congress Reduces BAQ Benefits Prospectively for Some Single Soldiers Paying Child Support

Section 602 of the National Defense Authorization Act for Fiscal Years 1992 and 1993[16] amends 37 U.S.C. § 403. Consequently, a soldier no longer will be entitled to basic allowance for quarters (BAQ) solely because he or she must satisfy a child support order, unless the mandatory support payment equals or exceeds the amount of the soldier's BAQ.[17] Moreover, a soldier that is assigned government quarters will have his or her entitlement limited to the difference between BAQ at the with-dependents rate and BAQ at the without-dependents rate.[18]

This change is not retroactive. Section 602(b) of the Act provides that soldiers who were collecting BAQ to satisfy child support obligations before December 5, 1991, will not be subject to this change, unless they become entitled at some future date to collect BAQ at the with-dependents rate because they acquire other qualifying dependents.[19] Major Connor.

Veterans' Law

Supreme Court Disapproves "Reasonableness" Test Limit on Veterans' Absences[20]

In a recent unanimous opinion, *King v. St. Vincent's Hospital*,[21] the Supreme Court overturned a circuit court's approval of an employer's right to deny a leave of absence to an employee serving on military duty if the period of military service is unduly long or otherwise unreasonable. The Supreme Court specifically held that one section of the Veterans' Reemployment Rights Law (VRRL)[22] does not limit the duration of an employee's absence for certain kinds of military service, after which the employee retains a right to civilian reemployment.[23]

In *King*, the petitioner, a member of the Alabama National Guard, had been selected to serve a three-year tour of duty as a command sergeant major in the Active Guard Reserve program. While giving notice to his employer, St. Vincent's Hospital, King requested a leave of absence.[24] He then reported for military duty.[25] St. Vincents' Hospital subsequently denied the request for leave, asserting it was unreasonable. The hospital then initiated a declaratory judgment action, asking the court to determine whether the VRRL provided reemployment rights after tours of duty as long as King's would be.

The district court agreed with the employer that King's requested leave of absence was "unreasonable." The Eleventh Circuit later affirmed that decision.[26] Reversing the Eleventh Circuit, the Supreme Court refused to read a "reasonable duration" limit into King's right under section 2024(d) to a leave of absence "for the period

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[12] Qualifying expenses are "reasonable and necessary expenses," specifically including adoption agency fees, placement fees, legal fees and court costs, medical expenses, expenses relating to the biological mother's pregnancy and childbirth, and temporary foster care. *See* Pub. L. 100-180, § 638(g)(3), 101 Stat. 1019, 1107-08, (1987).

[13] *Id.*, § 638(c), 101 Stat. at 1107 (1987).

[14] Although the program is supposed to be permanent, the House conference report calls for the General Accounting Office to conduct a two-year study to evaluate the value of the program as an incentive for recruitment and retention. H.R. Conf. Rep. No. 311, 102d Cong., 1st Sess. 554 (1991).

[15] Pub. L. 102-190, § 651(b), 102 Stat. 1290, 1386-87 (1991) (to be codified at 14 U.S.C. § 514).

[16] *Id.*, § 602, 102 Stat. at 1373 (to be codified at 37 U.S.C. § 403(m)).

[17] *Id.*, § 602(a), 102 Stat. at 1373 (to be codified at 37 U.S.C. § 403(m)(2)).

[18] *Id.* (to be codified at 37 U.S.C. § 403(m)(1)).

[19] *Id.*, § 602(b), 102 Stat. at 1373.

[20] This note updates TJAGSA Practice Note, *Supreme Court Agrees to Hear Veterans' Reemployment Rights Case*, The Army Lawyer, Apr. 1991, at 47.

[21] No. 90-289, 1991 U.S. LEXIS 7175 (December 16, 1991); 1991 WL 261754 (U.S. Dec. 16, 1991). Justice Clarence Thomas did not participate in the consideration or decision of the case.

[22] 38 U.S.C.A. § 2024(d) (West Supp. 1991).

[23] *King*, 1991 U.S. LEXIS 7175, at *3.

[24] *Id.* at *4.

[25] *Id.*

[26] 901 F.2d 1068 (11th Cir. 1990).

required to perform active duty for training or inactive duty training in the Armed Forces''—thereby resolving a conflict among the circuits.[27] Indeed, unlike other provisions of the VRRL, section 2024(d) does not provide any limit on the length of absences. An employee relying on its protection, however, should remember to continue to request a leave of absence to perform his or her military duties. Equally as important for preserving the protections of this provision, the employee must remember to report for work at the beginning of the next regularly scheduled work period after his or her military service obligation ends. Major Hancock.

Tax Note

Recordkeeping

As the season for preparing tax returns begins, many taxpayers also begin the annual ritual of scurrying about in search of important tax records and receipts. Although now may be too late to avoid a scavenger hunt for 1991 tax records, today is the right time to set up a simple filing system for 1992. A little effort now will reduce the scurrying required next year.

Internal Revenue Service (IRS) Publication 552, *Recordkeeping for Individuals*,[28] provides recordkeeping guidance to taxpayers. In general, taxpayers need to retain records of deductible expenses that may reduce their income tax liabilities. Taxpayers who itemize deductions on Schedule A (Form 1040) should keep sales slips, receipts, cancelled checks, and similar documents to verify deductions and credits shown on their tax returns. For example, taxpayers should retain the following documents:

- Form W-2, Wage and Tax Statement;
- Form W-2P, Statement For Recipients of Annuities, Pensions, Retired Pay, or IRA Payments;
- Form 1099 series (showing interest, dividends, and distributions); and
- Tax returns from prior years.

The best system is one that works for the taxpayer. A system should be both simple and convenient. One easy system begins with a file folder labeled ''1992 TAX RECORDS.'' Depending upon the taxpayer's income and expenses, one or more sheets of paper could be labeled for each month of the year and inserted into the file folder. Column headings could include date, payee, medical and dental expenses, taxes, interest, contributions, and miscellaneous—the last leaving room for the taxpayer to explain the natures and the amounts of the miscellaneous expenses. The taxpayer then could list tax-related expenses in the appropriate column as they occur, attaching supporting records, such as receipts or cancelled checks, to the page for future reference. The taxpayer should keep the file folder in a safe, readily accessible location for quick and easy access.

Taxpayers may want to keep receipts[29] showing the following kinds of expenses:

- medical and dental expenses, including fees for doctors, dentists, nurses, hospital care, prescription drugs and insulin, health insurance premiums, hearing aids, dentures, eyeglasses, and transportation for medical purposes;
- taxes, such as real estate taxes or personal property taxes;
- interest payments, including home mortgage interest and interest on bank loans;
- charitable contributions, including donations of cash or property to community chest, church or synagogue, schools, and other qualifying organizations; and
- miscellaneous qualifying expenses, such as professional dues, subscriptions to professional journals, uniforms, and tax assistance fees.

Taxpayers should keep their tax records for as long as the records are important. Usually they should keep records for at least three years from the date their tax returns were filed, or two years after the date their taxes were paid, whichever is later. To be completely safe, taxpayers probably should retain all tax-related records for at least six years.

Some records should be retained indefinitely. For example, a taxpayer should keep records showing the basis of a home or other asset for at least three years after the asset is transferred. A taxpayer that buys and sells his or her ''principal residence'' and defers the gain should retain closing statements on all homes and replacement homes until the last home is sold. Other important records to retain include:

- Brokerage statements showing purchase price of stock—the taxpayer should keep these documents until the stock is sold.

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[27] *Compare* Lee v. Pensacola, 634 F.2d 886, 889 (5th Cir. 1981); Gulf States Paper Corp. v. Ingram, 811 F.2d 1464 (11th Cir. 1987); Eidukonis v. Southeastern Pa. Transp. Auth., 873 F.2d 688, 694 (3rd Cir. 1989) *with* Kolkhorst v. Tilghman, 897 F.2d 1282, 1286 (4th Cir. 1990).

[28] Internal Revenue Serv., Pub. 552, Recordkeeping for Individuals (1992). Taxpayers may obtain this publication from the IRS by calling the following toll-free number: (800) 829-3676. *Recordkeeping for Individuals* can help taxpayers identify which records they should retain.

[29] Every taxpayer also should keep his or her checkbook, which can be a basic source for recording deductible expenses. Cancelled checks alone, however, are not always adequate proof that an amount can be deducted.

- Records of contributions to nondeductible Individual Retirement Arrangements (IRAS)—the taxpayer should keep these documents until all IRA funds are withdrawn.

Although, recordkeeping takes a little time and effort now, it will save time next year if the taxpayer uses it *regularly* this year! Major Hancock.

Claims Report

United States Army Claims Service

Tort Claims Note

Lessons Learned—Service Response Force Exercise 1990

The United States Army Material Command Surety Field Activity and the United States Army Defense Ammunition Center and School conducted an Army Service Response Force Exercise (SRFX-90) from June 11 through June 15, 1990, at Seneca Army Depot, Romulus, New York. The objectives of SRFX-90 were to provide training for qualified participants, to exercise current plans, to test new concepts, to focus on management of long-term site restoration and community relations, and to obtain lessons learned to foster improvements.

Service Response Force Exercise-90, which presented a simulated accident involving nuclear weapons, portrayed the challenges and pressures that would face an on-scene commander and the response elements under his or her control. In accordance with its area claims office responsibility, an Army claims team from the 10th Infantry Division (Mountain) at Fort Drum, New York, participated in SRFX-90 as part of the Service Response Force (SRF). The claims team members gained valuable experience and insight into the myriad problems and issues that could arise in responding to a disaster. This note shares some of the more significant and valuable of the lessons learned from a claims perspective.

One must distinguish the claims mission from other legal missions conducted during an SRFX. Providing a fact sheet that explains the claims mission and discloses the claims team's location and hours of operation could be of great benefit to the state, local, and federal agencies that also participate in the exercise.

Claims officers that participate in disaster responses must actively investigate and coordinate the claims aspects of the disaster. They also should ensure, as much as they can, that other participants in the exercise coordinate SRF staff actions that have a potential claims impact with them. A properly drafted disaster plan—similar to the sample disaster claims plan found at figure 5, Department of the Army Pamphlet 27-162, Legal Services, Claims (15 Dec. 1989)—will go a long way to ensure that disaster claims are investigated and adjudicated properly. Providing a copy of this disaster plan to the SRF staff should ensure that the SRF staff members have at least a basic understanding of the claims team's responsibilities and methods of operation. This will help the team to integrate with the SRF and to assist the SRF in functioning properly.

The primary missions of a claims team include investigating incidents, interviewing potential claimants, discussing claims procedures, and preparing for litigation. With this in mind, the claims team should spend a significant amount of time ensuring that information is preserved for future litigation. Interviewing the people who first responded to the site—or, at least, securing a list of the names of response team personnel—is essential.

One response to this simulated disaster involved state authorities acting to protect civilians in the affected area. This raised the issue of which agency (Army, state, or the Federal Emergency Management Agency) should assume responsibility for claims filed by civilians evacuated at the state's direction. The United States Army Claims Service's (USARCS) position, which the USARCS communicated to the participants, is that the Army would not issue emergency partial payments to these civilians if the Army was not the direct cause of their monetary losses. To determine the causes of civilians' losses would be possible only if the claims team thoroughly and expeditiously investigated each of these claims.

Although other agencies and organizations are responsible in most instances for providing the claims team with accurate and current information on all significant aspects of the accident response, each claims officer must be aware of his or her responsibilities as part of the response force team. Locating the claims team center near the Federal Response Center (FRC), so that claims officers can establish liaison with FRC personnel immediately upon their arrival on site, is critical. This would facilitate and enhance coordination with representatives from other federal and state agencies who possibly could provide direct relief to civilians that are referred to the Army claims team for assistance, but that have needs arising from non-Army response activities. For example, Department of Health and Human Services representatives may be able to provide housing assistance to individuals displaced

from their homes. This coordination effort could provide needed relief to inconvenienced civilians in a form better than monetary payments, probably would be faster than the Army claims process, and also could help to decrease the number of claims that eventually would be filed against the Army.

Tapping into the pipeline of information also will be important because the claims team members will be expected to participate in various press conferences. Being informed, combined with a good working relationship with the public affairs officer (PAO), provides for much more useful press conferences.

Furthermore, the claims mission requires the claims team to talk with potential claimants. Being located at, or near, the FRC allows the claims team to learn of developing events, to assess the claims impact of the events, and to prepare for claimants by remaining abreast of the continually changing situation. Lieutenant Colonel Thomson.

Personnel Claims Notes

Certifying Fraudulent Claims Payments

A continental United States (CONUS) field claims office has reported an incident in which a legal specialist and a noncommissioned officer (NCO) adjudicating personnel claims prepared several false payment vouchers for themselves and gave them to the claims judge advocate to sign along with other vouchers. The claims judge advocate apparently signed these fraudulent vouchers without reading them. The individuals then destroyed the false Department of Defense Forms 1842 and the comeback copies of the voucher to avoid detection.

The scheme surfaced when finance personnel noticed a discrepancy in one voucher and alerted the claims office, which then reconciled its record of payments with the finance office's record of expenditures. Other personnel also may have been involved and the incident is still under criminal investigation.

Sworn statements in the case indicate that personnel at other claims offices inside and outside CONUS may have perpetrated similar frauds in the past. The persons apprehended apparently did not originate the idea, but learned of it from other NCOs who have falsified vouchers.

A claims judge advocate, or claims attorney, that signs a claims voucher is certifying that the payment is legally correct. He or she then becomes pecuniarily liable for improper payments. An approving authority should certify payment only after reviewing the claim file to ensure that legal authority exists to pay the claim and comparing the information in the file with the name, address, and amount on the voucher.

Because honest claims personnel sometimes make mistakes in preparing vouchers and finance personnel may use the wrong accounting classification to enter payments and deposits, a careful review of vouchers and the monthly reconciliation of claims payments and deposits with finance records primarily serves to detect honest errors. Careful review and monthly reconciliation, however, also deter fraud and allow approving authorities to detect fraudulent vouchers easily if any are submitted. Claims judge advocates that sign whatever is placed in front of them and do not reconcile their payments with finance office records invite fraud.

Claims judge advocates and civilian supervisors should review their office payment and payment reconciliation procedures. They also should observe warning signs that indicate that subordinates may have personal financial difficulties. Emphasizing mechanisms for detecting improper payments and assisting subordinates in financial trouble may help to deter future fraudulent schemes. Mr. Frezza.

Philippine Volcano Claims

A few soldiers stationed in the Philippines left vehicles and other personal property behind during the evacuation of Clark Air Force Base (AFB) after the eruption of Mount Pinatubo. Since then, most of the vehicles and property left behind have been shipped.

Army claims offices receiving Philippine volcano claims must identify them by inserting "PV" in the "Note" field of the Revised Personnel Claims Management Program. Air Force personnel inspected damaged property prior to shipment and personnel at the Air Force Claims and Tort Litigation Staff can provide Army offices with the results of these inspections. The points of contact at Air Force Claims and Tort Litigation Staff are Major Adams and Ms. Wagner, at DSN 297-1585.

The Army generally is following the lead of the Air Force in adjudicating these claims. Accordingly, on vehicles damaged by the eruption, the Commander, USARCS, will waive the maximum allowances for automobile paint jobs and will authorize claims offices to pay the repair cost or the fair market value for up to two vehicles. Some of the vehicles left behind at Clark AFB, however, are not authorized to be shipped at government expense. On these so-called "Clarkmobiles," the Air Force is paying the repair cost in the Philippines or the fair market value, whichever is less.

A few Army claims offices have received inquiries from Department of Defense Dependent Schools (DODDS) school teachers that formerly were employed at Clark AFB. The Air Force has agreed to settle volcano damage claims from these DODDS teachers. If your office receives any of these claims, please forward them to the following address:

Claims and Tort Litigation Division
Air Force Legal Services Agency
Building 5683
Bolling Air Force Base
Washington, DC 20332-6128

Questions concerning Philippine volcano claims should be referred to Captain Boucher at DSN 923-4240. Mr. Frezza.

Guard and Reserve Affairs Item

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

Quotas for JATT and JAOAC for AY 1992

Quotas for Judge Advocate Triennial Training (JATT) and the Judge Advocate Officers Advanced Course (JAOAC) are available on ATRRS (Army Training Requirements and Resource System). To qualify for JATT, you must be a United States Army Reserve judge advocate in a court-martial trial team, court martial defense team, or a military judge team. To qualify for JAOAC, you must be a Reserve component judge advocate, currently enrolled in the advanced course, who has not completed any portion of the military justice subcourses (Phase II). Quotas are available *only* through ATRRS, the Army's automation system for the allocation of training spaces. If you are an Army Reservist in a troop unit or a National Guardsman, you should contact your training noncomissioned officer to request a quota. If you are an individual mobilization augmentee or an individual ready reservist, you should contact ARPERCEN, JAG PMO at 1-800-325-4916 or (314) 538-3762. When you request a quota, advise your point of contact that the school code for The Judge Advocate General's School (TJAGSA) in ATRRS is 181. **All quotas for courses at TJAGSA now are available only through ATRRS. Do not call TJAGSA to obtain a quota for any course, including JATT and JAOAC, because TJAGSA cannot enter you into ATRRS.**

Proposed Solicitation

The Office of The Judge Advocate General, Environmental Law Division (ELD) would like to hear from Reserve and National Guard Judge Advocate General Corps officers who have expertise and experience in water law issues. The Judge Advocate General recently signed a memorandum of understanding with the Chief Counsel, United States Army Corps of Engineers, which places the primary responsibility for water law advice on staff judge advocates and command legal counsel. Reserve and National Guard judge advocates interested in working on water law issues to earn retirement point credits toward qualifying years of service in the Reserves or National Guard should contact LTC Kevin Call or Major Mark Graham at ELD. Telephone: (703) 696-1230 or DSN 226-1230, FAX: (703) 696-2940.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices, which receive them from the MACOMs. Reservists obtain quotas through their unit, or through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200 if they are nonunit reservists. Army National Guard personnel must request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7115, extension 307; commercial telephone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

1992

9-13 March: 30th Legal Assistance Course (5F-F23).

16-20 March: 50th Law of War Workshop (5F-F42).

23-27 March: 16th Administrative Law for Military Installations Course (5F-F24).

30 March-3 April: 6th Government Materiel Acquisition Course (5F-F17).

6-10 April: 111th Senior Officers Legal Orientation (5F-F1).

13-17 April: 12th Operational Law Seminar (5F-F47).

13-17 April: 3d Law for Legal NCO's Course (512-71D/E/20/30).

21-24 April: Reserve Component Judge Advocate Workshop (5F-F56).

27 April-8 May: 127th Contract Attorneys Course (5F-F10).

18-22 May: 34th Fiscal Law Course (5F-F12).

18-22 May: 41st Federal Labor Relations Course (5F-F22).

18 May-5 June: 35th Military Judge Course (5F-F33).

1-5 June: 112th Senior Officers Legal Orientation (5F-F1).

8-10 June: 8th SJA Spouses' Course (5F-F60).

8-12 June: 22d Staff Judge Advocate Course (5F-F52).

15-26 June: JATT Team Training (5F-F57).

15-26 June: JAOAC (Phase II) (5F-F55).

6-10 July: 3d Legal Administrator's Course (7A-550A1).

13-17 July: U.S. Army Claims Service Training Seminar.

13-17 July: 4th STARC JA Mobilization and Training Workshop.

15-17 July: Professional Recruiting Training Seminar.

20 July-25 September: 128th Basic Course (5-27-C20).

20-31 July: 128th Contract Attorneys Course (5F-F10).

3 August-14 May 93: 41st Graduate Course (5-27-C22).

3-7 August: 51st Law of War Workshop (5F-F42).

10-14 August: 16th Criminal Law New Developments Course (5F-F35).

17-21 August: 3d Senior Legal NCO Management Course (512-71D/E/40/50).

24-28 August: 113th Senior Officers Legal Orientation (5F-F1).

31 August-4 September: 13th Operational Law Seminar (5F-F47).

14-18 September: 9th Contract Claims, Litigation, and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

May 1992

4-6: GWU, Patents, Technical Data, and Computer Software, Washington, D.C.

5-8: ESI, Procurement for Project Managers, Administrators, and COTRs, Washington, D.C.

7: ABA, Hazardous Waste & Superfund 1992, various locations.

7-8: ABA, Effective Marshalling of the Facts, Chicago, IL.

10-14: NCDA, Prosecuting Drug Cases, Chicago, IL.

11-15: SLF, Short Course on Labor Law & Labor Arbitration, Westin, TX.

12-15: ESI, Competitive Proposals Contracting, Vienna, VA.

13-14: ESI, International Offsets and Countertrade, Washington, D.C.

16-22: AAJE, Criminal Trial Skills, League City, TX.

17-21: NCDA, Trial Advocacy, New Orleans, LA.

19-22: ESI, Contract Accounting and Financial Management, Washington, D.C.

20-21: ESI, Claims and Disputes, Seattle, WA.

27-28: ESI, Marketing to the Government, Washington, D.C.

28-29: ALIABA, Securities Law for Nonsecurities Lawyers, San Diego, CA.

For further information on civilian courses, please contact the institutions offering the courses. The addresses are listed below.

AAJE: American Academy of Judicial Education, 1613 15th Street, Suite C, Tuscaloosa, AL 35404. (205) 391-9055.

ABA: American Bar Association, 750 North Lake Shore Drive, Chicago, IL 60611. (312) 988-6200.

ABICLE: Alabama Bar Institute for Continuing Legal Education, P.O. Box 870384, Tuscaloosa, AL 35487-0384. (205) 348-6230.

AICLE: Arkansas Institute for CLE, 400 West Markham, Little Rock, AR 72201. (501) 375-3957.

AKBA: Alaska Bar Association, P.O. Box 100279, Anchorage, AK 99510. (907) 272-7469.

ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104. (800) CLE-NEWS; (215) 243-1600.

ASLM: American Society of Law and Medicine, Boston University School of Law, 765 Commonwealth Avenue, Boston, MA 02215. (617) 262-4990.

BNA: The Bureau of National Affairs Inc., 1231 25th Street NW., Washington, D.C. 20037. (800) 424-9890 (conferences); (202) 452-4420 (conferences); (800) 372-1033; (202) 258-9401.

CCEB: Continuing Education of the Bar, University of California Extension, 2300 Shattuck Avenue, Berkeley, CA 94704. (415) 642-0223; (213) 825-5301.

CHBA: Chicago Bar Association, CLE, 29 South LaSalle Street, Suite 1040, Chicago, IL 60603. (312) 782-7348.

CLEC: Continuing Legal Education in Colorado, Inc., 1900 Grant Street, Suite 900, Denver, CO 80203. (303) 860-0608.

CLESN: CLE Satellite Network, 920 Spring Street, Springfield, IL 62704. (217) 525-0744, (800) 521-8662.

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53715. (608) 262-3588.

EEI: Executive Enterprises, Inc., 22 W. 21st Street, New York, NY 10010-6904. (800) 332-1105.

ESI: Educational Services Institute, 5201 Leesburg Pike, Suite 600, Falls Church, VA 22041-3203. (703) 379-2900.

FB: Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300. (904) 222-5286.

FBA: Federal Bar Association, 1815 H Street NW., Washington, D.C. 20006-3604. (202) 638-0252.

FP: Federal Publications, 1120-20th Street N.W., Washington, D.C. 20036. (202) 337-7000.

GICLE: The Institute of Continuing Legal Education in Georgia, P.O. Box 1885, Athens, GA 30603. (404) 542-2522.

GII: Government Institutes, Inc., 966 Hungerford Drive, Suite 24, Rockville, MD 20850. (301) 251-9250.

GULC: Georgetown University Law Center, CLE Division, 777 N. Capitol Street N.E., Suite 405, Washington, D.C. 20002. (202) 408-0990.

GWU: Government Contracts Program, The George Washington University, National Law Center, 2020 K Street N.W., Room 2107, Washington, D.C. 20052. (202) 994-5272.

HICLE: Hawaii Institute for CLE, UH Richardson School of Law, 2515 Dole Street, Room 203, Honolulu, HI 96822-2369. (808) 948-6551.

ICLEF: Indiana CLE Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204. (317) 637-9102.

IICLE: Illinois Institute for CLE, 2395 W. Jefferson Street, Springfield, IL 62702. (217) 787-2080.

JMLS: John Marshall Law School, 315 South Plymouth Court, Chicago, IL 60604. (312) 427-2737, ext. 573.

KBA: Kansas Bar Association, 1200 Harrison Street, P.O. Box 1037, Topeka, KS 66601. (913) 234-5696.

LEI: Law Education Institute, 5555 N. Port Washington Road, Milwaukee, WI 53217. (414) 961-1955.

LRP: LRP Publications, 421 King Street, P.O. Box 1905, Alexandria, VA 22313-1905. (703) 684-0510; (800) 727-1227.

LSBA: Louisiana State Bar Association, 210 O'Keefe Avenue, Suite 600, New Orleans, LA 70112. (800) 421-5722; (504) 566-1600.

LSU: Louisiana State University, Center of Continuing Professional Development, Paul M. Herbert Law Center, Baton Rouge, LA 70803-1008. (504) 388-5837.

MBC: Missouri Bar Center, 326 Monroe St., P.O. Box 119, Jefferson City, MO 65102. (314) 635-4128.

MCLE: Massachusetts Continuing Legal Education, Inc., 20 West Street, Boston, MA 02111. (800) 632-8077; (617) 482-2205.

MICLE: Institute of Continuing Legal Education, 1020 Greene Street, Ann Arbor, MI 48109-1444. (313) 764-0533; (800) 922-6516.

MICPEL: Maryland Institute for Continuing Professional Education of Lawyers, Inc. 520 W. Fayette Street, Baltimore, MD 21201. (301) 238-6730.

MILE: Minnesota Institute of Legal Education, 25 South Fifth Street, Minneapolis, MN 55402. (612) 339-MILE.

MLI: Medi-Legal Institute, 15301 Ventura Boulevard, Suite 300, Sherman Oaks, CA 91403. (800) 443-0100.

MSBA: Maine State Bar Association, 124 State Street, P.O. Box 788, Augusta, ME 04332-0788. (207) 622-7523.

NCBF: North Carolina Bar Foundation, 1312 Annapolis Drive, P.O. Box 12806, Raleigh, NC 27605. (919) 828-0561.

NCCLE: National Center for Continuing Legal Education, Inc., 431 West Colfax Avenue, Suite 310, Denver, CO 80204.

NCDA: National College of District Attorneys, University of Houston Law Center, 4800 Calhoun Street, Houston, TX 77204-6380. (713) 747-NCDA.

NCJFC: National College of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8970, Reno, NV 89507. (702) 784-4836.

NCLE: Nebraska CLE, Inc., 635 South 14th Street, P.O. Box 81809, Lincoln, NE 68501. (402) 475-7091.

NELI: National Employment Law Institute, 444 Magnolia Avenue, Suite 200, Larkspur, CA 94939. (415) 924-3844.

NHLA: National Health Lawyers Association, 522 21st Street N.W., Suite 120, Washington, DC 20006. (202) 833-1100.

NIBL: Norton Institutes on Bankruptcy Law, P.O. Box 2999, 380 Green Street, Gainesville, GA 30503. (404) 535-7722.

NITA: National Institute for Trial Advocacy, 1507 Energy Park Drive, St. Paul, MN 55108. (800) 225-6482; (612) 644-0323 in (MN and AK).

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89557. (702) 784-6747.

NJCLE: New Jersey Institute for CLE, One Constitution Square, New Brunswick, NJ 08901-1500. (201) 249-5100.

NKU: Northern Kentucky University, Chase College of Law, Office of Continuing Legal Education, Highland Hts., KY 41076. (606) 572-5380.

NLADA: National Legal Aid & Defender Association, 1625 K Street NW., Eighth Floor, Washington, D.C. 20006. (202) 452-0620.

NMTLA: New Mexico Trial Lawyers' Association, P.O. Box 301, Albuquerque, NM 87103. (505) 243-6003.

NPI: National Practice Institute, 330 Second Avenue South, Suite 770, Minneapolis, MN 55401. (612) 338-1977, (800) 328-4444.

NWU: Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611. (312) 908-8932.

NYSBA: New York State Bar Association, One Elk Street, Albany, NY 12207. (518) 463-3200; (800) 582-2452.

NYUSCE: New York University, School of Continuing Education, 11 West 42nd Street, New York, NY 10036. (212) 580-5200.

NYUSL: New York University, School of Law, Office of CLE, 715 Broadway, New York, NY 10003. (212) 598-2756.

OLCI: Ohio Legal Center Institute, P.O. Box 1377, Columbus, OH 43216-1377. (614) 487-8585.

PBI: Pennsylvania Bar Institute, 104 South Street, P.O. Box 1027, Harrisburg, PA 17108-1027. (800) 932-4637; (717) 233-5774.

PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. (212) 765-5700.

SBA: State Bar of Arizona, 363 North First Avenue, Phoenix, AZ 85003. (602) 252-4804.

SBMT: State Bar of Montana, P.O. Box 577, Helena, MT 59624-0577 (406) 442-7660.

SBT: State Bar of Texas, Professional Development Program, Capitol Station, P.O. Box 12487, Austin, TX 78711. (512) 463-1437.

SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 608, Columbia, SC 29202-0608. (803) 799-6653.

SLF: Southwestern Legal Foundation, P.O. Box 830707, Richardson, TX 75080-0707. (214) 690-2377.

STCL: South Texas College of Law, 1303 San Jacinto Street, Houston, TX 77002-7006. (713) 659-8040.

TBA: Tennessee Bar Association, 3622 West End Avenue, Nashville, TN 37205. (615) 383-7421.

UKCL: University of Kentucky, College of Law, Office of CLE, Suite 260, Law Building, Lexington, KY 40506-0048. (606) 257-2922.

UMLC: University of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124. (305) 284-4762.

USB: Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111-3834. (801) 531-9077.

USCLC: University of Southern California Law Center, University Park, Los Angeles, CA 90089-0071. (213) 743-2582.

USTA: United States Trademark Association, 6 East 45th Street, New York, NY 10017. (212) 986-5880.

UTSL: University of Texas School of Law, 727 East 26th Street, Austin, TX 78705. (512) 471-3663.

VACLE: Committee of Continuing Legal Education of the Virginia Law Foundation, School of Law, University of Virginia, Charlottesville, VA 22901. (804) 924-3416.

WSBA: Washington State Bar Association, Continuing Legal Education, 500 Westin Building, 2001 Sixth Avenue, Seattle, WA 98121-2599. (206) 448-0433.

WTI: World Trade Institute, One World Trade Center, 55 West, New York, NY 10048. (212) 466-4044.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
**Alabama	31 January annually
Arizona	15 July annually
Kansas	30 June annually
*California	36 hours over 3 years
Colorado	Anytime within three-year period
Delaware	31 July annually every other year
*Florida	Assigned monthly deadlines every three years
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	June 30 annually
**Louisiana	31 January annually
Michigan	31 March annually
Minnesota	30 August every third year
**Mississippi	31 December annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Mexico	30 days after program
**North Carolina	28 February of succeeding year
North Dakota	31 July annually
*Ohio	Every two years by 31 January
**Oklahoma	15 February annually
Oregon	Date of birth—new admittees and reinstated members report after an initial one-year period; thereafter, once every three years
**South Carolina	15 January annually
*Tennessee	1 March annually
Texas	Last day of birthmonth annually
Utah	31 December of second year of admission
Vermont	15 July every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June every other year
*Wisconsin	20 January every other year
Wyoming	30 January annually

For addresses and detailed information, see the January 1992 issue of *The Army Lawyer.*

*Military attorneys exempt

**Military attorneys must declare exemption

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided with biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer.* The following TJAGSA publications are available through DTIC. The nine-character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

*AD A239203 Government Contract Law Deskbook Vol. 1/JA-505-1-91 (332 pgs).

*AD A239204 Government Contract Law Deskbook, Vol. 2/JA-505-2-91 (276 pgs).

AD B144679 Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

Legal Assistance

AD B092128 USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).

*AD A241652 Office Administration Guide/JA 271-91 (222 pgs).

AD B135492 Legal Assistance Consumer Law Guide /JAGS-ADA-89-3 (609 pgs).

AD B147096 Legal Assistance Guide: Office Directory/JA-267-90 (178 pgs).

AD A241255 Model Tax Assistance Guide/JA 275-91 (66 pgs).

AD B147389 Legal Assistance Guide: Notarial/ JA-268-90 (134 pgs).

AD B147390 Legal Assistance Guide: Real Property/ JA-261-90 (294 pgs).

AD A228272 Legal Assistance: Preventive Law Series/ JA-276-90 (200 pgs).

AD A229781 Legal Assistance Guide: Family Law/ ACIL-ST-263-90 (711 pgs).

AD A230991 Legal Assistance Guide: Wills/JA-262-90 (488 pgs).

AD A230618 Legal Assistance Guide: Soldiers' and Sailors' Civil Relief Act/JA-260-91 (73 pgs).

AD B156056 Legal Assistance: Living Wills Guide/ JA-273-91 (171 pgs).

Administrative and Civil Law

*AD A239554 Government Information Practices/ JA-235(91) (324 pgs).

*AD A240047 Defensive Federal Litigation/JA-200(91) (838 pgs).

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

AD A236663 Reports of Survey and Line of Duty Determinations/JA 231-91 (91 pgs).

AD A237433 AR 15-6 Investigations: Programmed Instruction/JA-281-91R (50 pgs).

Labor Law

*AD A239202 Law of Federal Employment/JA-210-91 (484 pgs).

AD A236851 The Law of Federal Labor-Management Relations/JA-211-91 (487 pgs).

Developments, Doctrine & Literature

AD B124193 Military Citation/JAGS-DD-88-1 (37 pgs.)

Criminal Law

AD B100212 Reserve Component Criminal Law PEs/ JAGS-ADC-86-1 (88 pgs).

AD B135506 Criminal Law Deskbook Crimes and Defenses/JAGS-ADC-89-1 (205 pgs).

AD B137070 Criminal Law, Unauthorized Absences/ JAGS-ADC-89-3 (87 pgs).

AD B140529 Criminal Law, Nonjudicial Punishment/ JAGS-ADC-89-4 (43 pgs).

AD A236860 Senior Officers' Legal Orientation/JA 320-91 (254 pgs).

AD B140543L Trial Counsel and Defense Counsel Handbook/JA 310-91 (448 pgs).

AD A233621 United States Attorney Prosecutors/ JA-338-91 (331 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication is also available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations & Pamphlets

a. *Obtaining Manuals for Courts-Martial, DA Pams, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Its address is:

Commander
U.S. Army Publications Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from AR 25-30 is provided to assist Active, Reserve, and National Guard units.

The units below are authorized publications accounts with the USAPDC.

(1) Active Army.

(a) Units organized under a PAC. A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam 25-33.)

(b) Units not organized under a PAC. Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(c) Staff sections of FOAs, MACOMs, installations, and combat divisions. These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in *(b)* above.

(2) ARNG units that are company size to State adjutants general. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(3) USAR units that are company size and above and staff sections from division level and above. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(4) ROTC elements. To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the paragraphs] above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

Specific instructions for establishing initial distribution requirements appear in DA Pam 25-33.

If your unit does not have a copy of DA Pam 25-33, you may request one by calling the Baltimore USAPDC at (301) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using DA Form 4569. All DA Form 4569 requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. This office may be reached at (301) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. They can be reached at (703) 487-4684.

(6) Navy, Air Force, and Marine JAGs can request up to ten copies of DA Pams by writing to U.S. Army Publications Distribution Center, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Telephone (301) 671-4335.

b. Listed below are new publications and changes to existing publications.

Number	Title	Date
AR 40-501	Medical Services Standards of Medical Fitness, Interim Change I01	1 Oct 91
CIR 11-89-2	Internal Control Review Checklist, Interim Change I01	27 Sep 91
CIR 11-90-1	Internal Control Review Checklist, Interim Change I01	27 Sep 91
PAM 25-30	Index of Army Pubs and Blank Forms	30 Sep 91
PAM 360-503	92/93 Voting Assistance Guide	

3. OTJAG Bulletin Board System.

a. Numerous TJAGSA publications are available on the OTJAG Bulletin Board System (OTJAG BBS). Users can sign on the OTJAG BBS by dialing (703) 693-4143 with the following telecommunications configuration: 2400 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 terminal emulation. Once logged on, the system will greet the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions and will then instruct them that they can use the OTJAG BBS after they receive membership confirmation, which takes approximately forty-eight hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the OTJAG BBS. Following are instructions for downloading publications and a list of TJAGSA publications that currently are available on the OTJAG BBS. The TJAGSA Literature and Publications Office welcomes suggestions that would make accessing, downloading, printing, and distributing OTJAG BBS publications easier and more efficient. Please send suggestions to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781.

b. *Instructions for Downloading Files From the OTJAG Bulletin Board System.*

(1) Log-on to the OTJAG BBS using ENABLE and the communications parameters listed in subparagraph a above.

(2) If you never have downloaded files before, you will need the file decompression program that the OTJAG BBS uses to facilitate rapid transfer of files over the phone lines. This program is known as the PKZIP utility. To download it onto your hard drive, take the following actions after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12].

(c) Once you have joined the Automation Conference, enter [d] to Download a file.

(d) When prompted to select a file name, enter [pkz110.exe]. This is the PKZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(f) The system will respond by giving you data such as download time and file size. You should then press the F10 key, which will give you a top-line menu. From this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol.

(g) The menu then will ask for a file name. Enter [c:\pkz110.exe].

(h) The OTJAG BBS and your computer will take over from here. Downloading the file takes about twenty minutes. Your computer will beep when file transfer is complete. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off of the OTJAG BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C> prompt. The PKZIP utility then will execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKZIP utility program.

(3) To download a file, after logging on to the OTJAG BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c below.

(c) If prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the OTJAG BBS responds with the time and size data, type F10. From the top-line menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol.

(e) When asked to enter a filename, enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. When you hear a beep, file transfer is complete, and the file you downloaded will have been saved on your hard drive.

(g) After file transfer is complete, log-off of the OTJAG BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not a compressed, you can use it on ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system

C> prompt, enter [pkunzip{space}xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the OTJAG BBS). The PKZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "xxxxx.DOC" by following the instructions in paragraph 4(a) above.

c. *TJAGSA Publications available through the OTJAG BBS.* Below is a list of publications available through the OTJAG BBS. The file names and descriptions appearing in bold print denote new or updated publications. All active Army JAG offices, and all Reserve and National Guard organizations having computer telecommunications capabilities, should download desired publications from the OTJAG BBS using the instructions in paragraphs a and b above. Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having a bona fide military need for these publications, may request computer diskettes containing the publications listed below from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International Law; or Doctrine, Developments, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781. Requests must be accompanied by one 5¼-inch or 3½ -inch blank, formatted diskette for each file. In addition, requests from IMAs must contain a statement which verifies that they need the requested publications for purposes related to their military practice of law.

Filename	Title
121CAC.ZIP	The April 1990 Contract Law Deskbook from the 121st Contract Attorneys Course
1990YIR.ZIP	1990 Contract Law Year in Review in ASCII format. It was originally provided at the 1991 Government Contract Law Symposium at TJAGSA
505-1.ZIP	TJAGSA Contract Law Deskbook, Vol. 1, May 1991
505-2.ZIP	TJAGSA Contract Law Deskbook, Vol. 2, May 1991
506.ZIP	TJAGSA Fiscal Law Deskbook, May 1991
ALAW.ZIP	Army Lawyer and Military Law Review Database in ENABLE 2.15. Updated through 1989 Army Lawyer Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF
CCLR.ZIP	Contract Claims, Litigation, & Remedies
FISCALBK.ZIP	The November 1990 Fiscal Law Deskbook from the Contract Law Division, TJAGSA
FISCALBK.ZIP	May 1990 Fiscal Law Course Deskbook in ASCII format
JA200A.ZIP	Defensive Federal Litigation 1
JA200B.ZIP	Defensive Federal Litigation 2
JA210A.ZIP	Law of Federal Employment 1
JA210B.ZIP	Law of Federal Employment 2
JA231.ZIP	Reports of Survey & Line of Duty Determinations Programmed Instruction.
JA235.ZIP	Government Information Practices
JA240PT1.ZIP	Claims—Programmed Text 1
JA240PT2.ZIP	Claims—Programmed Text 2
JA241.ZIP	Federal Tort Claims Act
JA260.ZIP	Soldiers' & Sailors' Civil Relief Act
JA261.ZIP	Legal Assistance Real Property Guide
JA262.ZIP	Legal Assistance Wills Guide
JA263A.ZIP	Legal Assistance Family Law 1
JA265A.ZIP	Legal Assistance Consumer Law Guide 1
JA265B.ZIP	Legal Assistance Consumer Law Guide 2
JA265C.ZIP	Legal Assistance Consumer Law Guide 3
JA266.ZIP	Legal Assistance Attorney's Federal Income Tax Supplement
JA267.ZIP	Army Legal Assistance Information Directory
JA268.ZIP	Legal Assistance Notorial Guide
JA269.ZIP	Federal Tax Information Series
JA271.ZIP	Legal Assistance Office Administration
JA272.ZIP	Legal Assistance Deployment Guide
JA281.ZIP	AR 15-6 Investigations
JA285A.ZIP	Senior Officer's Legal Orientation 1
JA285B.ZIP	Senior Officer's Legal Orientation 2
JA290.ZIP	SJA Office Manager's Handbook
JA296A.ZIP	Administrative & Civil Law Handbook 1
JA296B.ZIP	Administrative & Civil Law Handbook 2
JA296C.ZIP	Administrative & Civil Law Handbook 3
JA296D.ZIP	Administrative & Civil Law Deskbook 4
JA296F.ARC	Administrative & Civil Law Deskbook 6
JA301.ZIP	Unauthorized Absence—Programed Instruction, TJAGSA Criminal Law Division

JA310.ZIP	Trial Counsel and Defense Counsel Handbook, TJAGSA Criminal Law Division
JA320.ZIP	Senior Officers' Legal Orientation Criminal Law Text
JA330.ZIP	Nonjudicial Punishment—Programmed Instruction, TJAGSA Criminal Law Division
JA337.ZIP	Crimes and Defenses Deskbook (DOWNLOAD ON HARD DRIVE ONLY.)
YIR89.ZIP	Contract Law Year in Review—1989

4. TJAGSA Information Management Items.

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

The TJAGSA Automation Management Officer also is compiling a list of JAG Corps e-mail addresses. If you have an account accessible through either DDN or PROFS (TRADOC system) please send a message containing your e-mail address to the postmaster address for DDN, or to "crankc(lee)" for PROFS.

b. Personnel desiring to reach someone at TJAGSA via autovon should dial 274-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. Personnel having access to FTS 2000 can reach TJAGSA by dialing 924-6300 for the receptionist or 924-6- plus the three-digit extension you want to reach.

d. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

5. The Army Law Library System.

a. With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JALS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781. Telephone numbers are autovon 274-7115 ext. 394, commercial (804) 972-6394, or fax (804) 972-6386.

b. The following material has been declared excess and is available for transfer. Please contact the following offices directly:

1. Headquarters, US Army Armament, Munitions and Chemical Command, Rock Island, IL 61299-6000, ATTN: Mrs. JoAnn Rosene. Telephone: DSN 793-4051

Northeastern Reporter, Vols. 1-200

Northern Reporter 3d, Vols.1-570

Shepard's Northeastern Reporter Citations

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